IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 72-6609**

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EUGENIO AND ALICIA JIMENEZ, by their father and next friend, RAMON JIMENEZ, *et al.*,

*Appellants,*

—v.—

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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INDEX


| | Page |
|---|---|
| 1. Chronological List of Relevant Docket Entries | 1 |
| 2. Notice of Decision, Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, dated December 11, 1970 | 2 |
| 3. Action of Appeals Council of Department of Health, Education and Welfare, dated April 16, 1971 | 11 |
| 4. Plaintiff's Complaint for Declaratory Judgment, Injunctive and Other Appropriate Relief, Filed June 15, 1971 | 13 |

Page

5. Answer of Defendant to Plaintiff's Complaint, Filed October 26, 1971 ..... 19

6. Memorandum Opinion and Judgment Order, Entered January 30, 1973 ..... 22

7. Orders of the Supreme Court granting leave to proceed herein *in forma pauperis* and noting probable jurisdiction ..... 33

# CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| | |
|---|---|
| June 15, 1971 | Plaintiff's Complaint for Declaratory Judgment, Injunctive and Other Appropriate Relief |
| October 26, 1971 | Answer of Defendant to Plaintiff's Complaint |
| January 30, 1973 | Memorandum Opinion and Judgment Order |

**DEPARTMENT OF**
**HEALTH, EDUCATION, AND WELFARE**
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Dec. 14, 1970

NOTICE OF DECISION

*Please Read Carefully*

If you disagree, in whole or in part, with the enclosed decision of the hearing examiner, you may request the Appeals Council to review it. However, your request for review must be filed *within 60 days* following the date shown below.

You, or your representative, may file the request for review at the nearest office of the Social Security Administration, or you may file the request for review with the hearing examiner, or with the Appeals Council.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under sections 205(g) and 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing examiner's decision mailed to the claimant and his representative, Jane G. Stevens, on December 11, 1970

REPRESENTATIVE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

HEARING EXAMINER'S DECISION

In the case of

Ramon C. Jimenez
(Claimant)

---

(Wage Earner) (Leave blank if same as above)

Claim for

Child's Insurance Benefits

305-30-8719
(Social Security Number)

This case comes before the hearing examiner upon a request for hearing filed on June 30, 1970 by Attorney Jane G. Stevens on behalf of the claimant and wage earner, Ramon C. Jimenez. She appeals from a determination of the Social Security Administration to the effect that the claimant's son, Eugenio and the claimant's daughter, Alicia, were not eligible for child's insurance benefits under the Social Security Act. At the hearing held on November 18, 1970, in Chicago, Illinois, the claimant was present and testified. Also present were Attorney Jane G. Stevens, claimant's representative and Martha Donis, interpreter.

PROCEDURAL HISTORY

Based on an application filed on September 4, 1963, claimant was found to be under a disability beginning April 1, 1963. He was awarded disability insurance benefits beginning with the month of October, 1963. Auxiliary benefits were also awarded to claimant's wife, Filomena Jimenez, and to the minor children of the claimant and his wife, Filomena.

On August 21, 1969 claimant filed an application for child's insurance benefits on behalf of certain illegitimate children as follows: Magdalena Jimenez, born August 13, 1963; Eugenio Jimenez, born January 18, 1965; Alicia Jimenez, born February 24, 1968. Upon denial of said application as to Eugenio and Alicia, of which claimant was notified by letter dated January 7, 1970, he requested reconsideration on March 18, 1970, and thereafter was notified by letter dated May 5, 1970 that the denial of his application for Eugenio and Alicia was affirmed. Claimant thereupon filed a request for hearing.

## Statement of Law

Under section 202(d) of the Social Security Act, in order for entitlement to child's insurance benefits, a child must have been dependent upon the wage earner at the beginning of the wage earner's period of disability or at the time he became entitled to disability insurance benefits. Section 216(h)(2)(A) of the Act provides that in determining whether an applicant is the child of a fully or currently insured individual for purposes of this title, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual was domiciled at the time such applicant files application (at the time of his death). Applicants who according to such law would have the same status relative to taking intestate personal property as a child shall be deemed such—in the State of Illinois, a child born out of wedlock can be legitimatized only under the following conditions: (1) that the parents intermarry and (2) that the father acknowledges the child.

Section 216(h)(3)(B) in substance and in pertinent part provides that an applicant who is a son or daughter of the wage earner, who does not otherwise qualify as a "child", shall nevertheless be deemed to be the child of the wage earner's if as early as the date on which the wage earner became entitled to disability insurance benefits:

(i) the wage earner—

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been declared by a court to be the father of the child, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter, or

(ii) the wage earner is shown to be the father of the applicant and was living with or contributing to the support of the applicant.

Section 403(a) of the Act states in pertinent part as follows:

> "Whenever a reduction is made under this subsection in the total of monthly benefits to which individuals are entitled for any month on the basis of wages and self-employment income of an insured individual, each such benefit other than the old-age or disability insurance benefit shall be proportionately decreased; except that if such total of benefits for such month includes any benefit or benefits under section 402(d) of this title which are payable solely by reason of section 416(h)(3) of this title, the reduction shall first be applied to reduce (proportionately where there is more than one benefit so payable) the benefit so payable (but not below zero)."

## Statement of Issues

The general issue is whether the claimant's (wage earner's) son, Eugenio, and his daughter, Alicia, are entitled to child's insurance benefits. This depends on whether said son and daughter were, within the meaning of the Social Security Act, the children or deemed to be the children or Ramon Jimenez.—Also for consideration is whether Magdalena Jimenez was entitled to child's insurance benefits as early as August 13, 1963, the date of her birth.

## SUMMARY OF EVIDENCE

It appears that the claimant, Ramon Jimenez, has continually been in a disability status since April 1, 1963, the time of original onset of his disability. For informational purposes it should be stated that the daughter, Magdalena, one of the illegitimate children, was determined to be in an entitlement status for the reason that she was born on August 13, 1963, shortly before the claimant, her father, became entitled to disability insurance benefits, in October, 1963, and she was not only acknowledged by the wage earner as his child but she was also, presumably, dependent upon the wage earner at the time he became entitled to disability insurance benefits.

In an interview of March 18, 1965, Elizabeth Hernandez, said that she and Ramon Jimenez have been living together about three years; that he has not divorced his wife, Filomena, who lives in Puerto Rico; that she, Elizabeth Hernandez, and Ramon Jimenez, the claimant herein, are the parents of Magdalena, Eugenio and Alicia Jimenez.—In an interview of October 2, 1969, claimant stated that he and Elizabeth Hernandez began living together some time in 1961.—In his application dated August 21, 1969 claimant stated that he had always supported said three children.—In an interview of October 2, 1969 claimant stated that he had never lived anywhere else with Elizabeth Hernandez except in the State of Illinois; that he has been supporting their children since their birth.

In his request for reconsideration which he filed on March 18, 1970, regarding his son Eugenio and his daughter Alicia, claimant stated that he did recognize these children in writing at the time prior to the beginning of his period of disability.

In the notice of reconsideration determination to the claimant dated May 5, 1970, it was stated in part as follows:

> "We have also considered the Amendments to the Social Security Act which provided various alternative tests which may qualify the children. Under these provisions, the child can qualify for benefits if

the father (1) acknowledges the child in writing or (2) decreed by a court to contribute to the child's support or (3) is shown by satisfactory evidence to be the child's father and living with or contributing to the child's support.

The Law requires that the acknowledgement, court decree, contributions or living with, must have been established at the time your disability began. A period of disability was established for you on April 1, 1963. The children were both born after this date and could not have been dependent on you even though you acknowledged them."

The aforesaid language of the notice of May 5, 1970 is borne out by the statutory provisions hereinabove cited. Thus, the son Eugenio, born on January 18, 1965, and the daughter, Alicia, born on February 24, 1968, born to Elizabeth Hernandez and fathered by the wage earner, cannot be eligible for entitlement to social security benefits, neither of them having been in being before or on October 1, 1963, when the wage earner first became entitled to disability insurance benefits.

It appears from the evidence of record that Magdalena, born on August 13, 1963, before the wage earner became entitled to disability insurance benefits, was eligible for entitlement purposes and that recently she was awarded benefits within the "maximum family benefit" clause as set forth in section 403(a) of the Act, herein before set forth. In this connection, claimant's counsel cites the case of Monica Jordan, by Carolyn Coleman, U.S.D.C., District of New Jersey, opinion filed on January 27, 1970 by Raynier J. Wortendyke, Jr. (J). In said case it is stated, in substance that Section 403(h)(3) creates one class, i.e., children. In said court decision it is further stated that the class born in-wedlock and those who were born out-of-wedlock, but acknowledged by the wage earner as his offspring, are both in the benefitted class. The inference drawn by claimant's counsel is that Magdalena, as early as August 13, 1963, the date of her birth, although born out-of-wedlock, was nevertheless entitled to a part of the maximum family

benefits, if indeed, the maximum family benefit should not have been enlarged so as to accommodate Magdalena and any and all children born out-of-wedlock which the wage earner might have produced or in the future will produce.

The Hearing Examiner is mindful of the rule of law which jealously guards the rights of innocent children against the transgressions of their parents. Yet the case of Jordan v.s. Finch is diametrically opposed to the clear and unequivocal wording of the statute.

## FINDINGS OF THE HEARING EXAMINER

1. Eugenio, the son of the wage earner, born on January 18, 1965, and Alicia, the daughter of the wage earner, born on February 24, 1968, were not in being and thus could not have been dependent upon the wage earner as of October 1, 1963 when he was first entitled to disability insurance benefits.
2. Within the meaning of the Social Security Act, said son and daughter were not the children nor deemed to be the children of the wage earner.
3. Magdalena, the daughter of the wage earner, born on August 13, 1963, was and is in an entitlement status, but she is entitled to child's insurance benefits only under the provisions of Section 203(a) (403(a) of the Social Security Act.

## DECISION

In accordance with the foregoing findings, it is the decision of the Hearing Examiner that the Administrative determination as to Eugenio, Alicia and Magdalena, is affirmed.

/s/ Thomas M. Walsh
THOMAS M. WALSH
Hearing Examiner

Date: December 11, 1970

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

[SEAL]

REFER TO: 305-30-8719
WHEN WRITING TO:
SOCIAL SECURITY OFFICE
2306 W. Lawrence Ave.
Chicago, Ill. 60625

January 7, 1970

Ramon C. Jimenez
3556 N. Wilton
Chicago, Ill. 60657

This notice refers to your claim for benefits under the Social Security Act for Alicia and Eugenio Jimenez.

We cannot pay child's benefits on your claim because a requirement of the social security law is not met. That requirement is that the father had acknowledged the child in writing or had been ordered by a court to contribute to the child's support or had been judicially decreed to be the child's father before the period of disability began or it has been otherwise established that he is the child's father and was living with or contributing to the support of the child at the time his period of disability began.

If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through your social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.

If you have any questions about your claim, you should get in touch with your social security office. If you call in person, please take this notice with you.

Sincerely yours,

/s/ F. H. Sheel
F. H. SHEEL
Director, Division of
Evaluation and
Authorization
Bureau of Disability
Insurance

Enclosure:
SSI-58

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. Box 2518, Washington, D.C. 20013

[SEAL]

BUREAU OF
HEARINGS AND APPEALS

HA:C
REFER TO: 305-30-8719

April 16, 1971

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Ramon Jimenez
3556 North Witton Avenue
Chicago, Illinois 60657

Dear Mr. Jimenez:

Your request for review of the hearing examiner's decision has been carefully considered by the Appeals Council. The Council's consideration of your request has included all the evidence in your case, the law and regulations applicable to your claim, the hearing examiner's evaluation of the facts and the reasoning in his decision, and your reasons for believing your claim should be allowed. Evidence in addition to that which was before the hearing examiner has been received by the Appeals Council.

The Appeals Council has concluded that the decision of the hearing examiner is correct. Further action by the Council would not, therefore, result in any change which would be of advantage to you. Accordingly, the hearing examiner's decision stands as the final decision of the Secretary in your case.

If you desire a review of the hearing examiner's decision by a court, you may commence a civil action in the district court of the United States in the judicial district in which you reside *within sixty (60) days* from this date. See section 205(g) of the Social Security Act, as amended

(section 405(g), Title 42, United States Code). If such action is commenced, the Secretary of Health, Education, and Welfare is the proper defendant.

Sincerely yours,

/s/ Jackson C. Smith
JACKSON C. SMITH
Member, Appeals Council

/s/ John T. Allen
JOHN T. ALLEN
Member, Appeals Council

cc: Jane G. Stevens
Attorney at Law

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No: 7- C 1436

MAGDALENA JIMENEZ, by RAMON JIMENEZ, her father and next friend, individually and on behalf of all others similarly situated, and EUGENIO JIMENEZ and ALICIA JIMENEZ, by RAMON JIMENEZ, their father and next friend, individually and on behalf of all other similarly situated, PLAINTIFFS

—*vs*—

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare, DEFENDANT

COMPLAINT

COUNT I

1: This is an action in the Judicial District in which Plaintiff resides to review a decision of the Secretary of Health, Education and Welfare. The Jurisdiction of this Court is based on 42 U.S.C. §405(g).

2: Plaintiff MAGDALENA JIMENEZ is a minor child of wage earner RAMON JIMENEZ: she is a citizen of the United States, and resides with her father in Chicago, Cook County, Illinois.

3: Plaintiff MAGDALENA JIMENEZ brings this action individually and as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all "claimants" for child's Social Security insurance benefits who are born out of wedlock, whose legitimate siblings receive or will receive at any time the total maximum family benefit to the total or partial exclusion of the illegitimate claimant.

The persons in this case are so numerous as to make joinder of all members unpracticable and there are questions of law common to all members of the class. The claims

of the individual Plaintiff are typical of the claims of the class, and the individual Plaintiff will fairly and adequately protect the interest of the class.

Separate actions by individual members of the class would create the risk of inconsistent adjudications that would establish incompatible standards of conduct for the defendant.

4: On August 21, 1969, RAMON JIMENEZ properly filed an application for child's insurance benefits on behalf of his three illegitimate children, including MAGDALENA JIMENEZ as provided by Section 202(d) of the Social Security Act (42 U.S.C. 402(d)).

5: On January 7, 1970, the Social Security Administration declared MAGDALENA entitled to child's insurance benefits as of August, 1968, but denied her rights to receive monthly benefits at that time. On March 18, 1970, Mr. Jimenez duly requested reconsideration. The Social Security Administration affirmed the decision and on June 30, 1970, Mr. Jimenez filed a request for a hearing.

6: After a hearing on November 18, 1970, Hearing Examiner Thomas M. Walsh, in a decision dated December 11, 1970, affirmed the denial of present equal benefits to MAGDALENA. A copy of this decision is attached hereto as "Exhibit A". On January 4, 1971, Mr. Jimenez requested a Review of the Hearing Examiner's Action.

7: The Appeals Council of the Social Security Administration denied Mr. Jimenez's request for review on April 16, 1971, thereby establishing the hearing examiner's decision as the final decision of the Secretary of Health, Education and Welfare.

8: This action for review of that final decision is commenced within the sixty (60) day period prescribed for such appeals.

9: RAMON JIMENEZ was awarded disability insurance benefits in October 1963, for a disability status that has existed since April, 1963. At that time auxiliary benefits were also awarded to Mr. Jimenez's wife, FILOMENA, and to their minor children, from whom Mr. Jimenez had

been separated for more than two years. Since his separation, he has lived with ELIZABETH HERNANDEZ who bore him three children out of wedlock, including MAGDALENA, one of the Plaintiffs herein, born August 13, 1963. RAMON JIMENEZ openly acknowledged MAGDALENA as his child. She has lived with her father since her birth; and has always been dependent on him for her support. Magdalena's dependence on her father has always been as great or greater than that of her legitimate siblings. Because Mr. Jimenez is disabled, MAGDALENA is presently supoprted by grants made to her father by the Cook County Department of Public Aid.

10: The Secretary's decision denying present benefits to MAGDALENA deprives MAGDALENA of that due process of law guaranteed to her by the Fifth Amendment to the Constitution of the United States because it is based on Section 203(a) of the Social Security Act (42 U.S.C. § 403(a)), which section is unconstitutional because it unreasonably and arbitrarily and without relation to the purposes of the Social Security Act denies MAGDALENA and all other members of the class shares of their parents' Social Security benefits equal to those granted to their legitimate siblings and even to any siblings who are born after an invalid ceremonial marriage between their parents, even though her needs are as great or greater than the needs of those siblings, solely on the basis of conduct of her parents which was beyond her control.

WHEREFORE, Plaintiff, MAGDALENA JIMENEZ prays that this Court:

1: Reverse the decision of the Secretary of Health, Education and Welfare denying present benefits to Plaintiff MAGDALENA JIMENEZ.

2: Direct the Defendant to pay to Plaintiff MAGDALENA JIMENEZ benefits equal to those paid each child of the wage earner RAMON JIMENEZ, and to pay Plaintiff retroactive equal benefits due to her since the date on which she became eligible,

3: Declare § 203(2) of the Social Security Act (42 U.S.C. § 403(a)) unconstitutional in so far as it denies to chil-

dren, as defined by § 216(H) (3) (42 U.S.C. § 416H) (3) equal shares in their family's benefits.

4: Enjoin the Defendant, his agents and employees from denying equal social security benefits to any member of the class.

## COUNT II

1: This is an action in the Judicial District in which Plaintiffs reside to review a decision of the Secretary of Health, Education and Welfare. The Jurisdiction of this Court is based on 42 U.S.C. § 405(g).

2: Plaintiffs EUGENIO and ALICIA JIMENEZ are citizens of the United States; they are minor children of wage earner RAMON JIMENEZ, and reside with him in Chicago, Cook County, Illinois.

3: Plaintiffs EUGENIO and ALICIA JIMENEZ bring this action individually and as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all claimants for child's social security insurance benefits, who are born out of wedlock after their fathers have become entitled to receive Social Security insurance benefits by reason of old age, disability, or death. The persons in this class are so numerous as to make joinder of all members unpracticable and there are questions of law common to all member of the class. The claims of the individual Plaintiff are typical of the claims of the class, and the individual Plaintiff will fairly and adequately protect the interest of the class. Separate actions by individual members of the class would create the risk of inconsistent adjudications that would establish incompatible standards of conduct for the Defendant.

4: On August 21, 1969 RAMON JIMENEZ properly filed an application for child's insurance benefits on behalf of his children including, EUGENIO and ALICIA JIMENEZ, as provided by Section 202(d) of the Social Security Act (42 U.S.C. § 402(d)).

5: Mr. Jimenez's claim for benefits for EUGENIO and

ALICIA was denied January 7, 1970, and on March 18, 1970, he duly requested reconsideration of that denial.

May 5, 1970, the Social Security Administration affirmed the initial denial of benefits to EUGENIO and ALICIA, on the ground that the children had been born out of wedlock, after the beginning of Mr. Jimenez's period of disability. On June 30, 1970, Mr. Jimenez filed a request for a hearing.

6: After a hearing on November 18, 1970, Hearing Examiner Thomas M. Walsh, in a decision dated December 11, 1970, affirmed the denial of all benefits to EUGENIO and ALICIA. A copy of this decision is attached hereto as "Exhibit A". On January 4, 1971, Mr. Jimenez requested a Review of the Hearing Examiner's Action.

7: Plaintiffs reallege paragraphs 7 and 8 of Count I and incorporate them herein by reference.

8: RAMON JIMENEZ was awarded disability insurance benefits in October 1963 for a period of disability that began April 1, 1963. In October, 1963 auxiliary benefits were also awarded to RAMON JIMENEZ's wife, from whom he had been separated for several years, and to their minor children. Beginning approximately in 1961, RAMON JIMENEZ had lived with ELIZABETH HERNANDEZ who bore him three children, including EUGENIO JIMENEZ, born on January 18, 1965 and ALICIA JIMENEZ, born on February 24, 1968; the Plaintiffs herein.

EUGENIO and ALICIA have lived with RAMON JIMENEZ all their lives; Mr. Jimenez openly acknowledges them as his children and has always made a home for them; they have always been dependent on him for their support. Their dependence on their father has always been as great or greater than that of their legitimate siblings. Because Mr. Jimenez is disabled, EUGENIO and ALICIA are presently supported by grants made to their father by the Cook County Department of Public Aid.

9: The Secretary's decision denying benefits to EUGENIO and ALICIA JIMENEZ deprives them of the due process of law guaranteed to them by the Fifth Amendment of the Constitution of the United States because it is based

on Section 216(h)(3) of the Social Security Act (42 U.S.C. § 416(h)(3) which Section is unconstitutional because it unreasonably and arbitrarily and without relation to the purposes of the Social Security Act denies Social Security benefits to EUGENIO and ALICIA and to all other members of the class regardless of their needs, solely on the basis of conduct of their parents which was completely beyond their control.

WHEREFORE, Plaintiffs pray that this Court:

1: Reverse the decision of the Secretary denying the claims of EUGENIO and ALICIA JIMENEZ for child's insurance benefits;

2: Direct the Defendant to pay to EUGENIO and ALICIA benefits equal to those paid each child of the wage earner RAMON JIMENEZ; and to pay them all retroactive benefits due to them from the date of their claims;

3: Declare unconstitutional Section 216(h)(3) of the Social Security Act (42 U.S.C. 416(h)(3)) in so far as it denied Social Security benefits to illegitimate children born after their parents become disabled or otherwise entitled to receive Social Security insurance;

4: Enjoin the Defendant, his agents and employees, from denying Social Security benefits to any members of the class, and

5: Grant all such other relief as the Court deems just and proper.

JANE G. STEVENS
Attorney for Plaintiffs
LEGAL AID BUREAU
1413 West 18th Street
Chicago, Illinois 60608
421-1900

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1436

MAGDALENA JIMENEZ, by RAMON JIMENEZ, her father and next friend, et al., PLAINTIFFS

*vs.*

ELLIOT RICHARDSON, Secretary of Health, Education, and Welfare, DEFENDANT

ANSWER

Now comes the defendant, UNITED STATES OF AMERICA, by WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, and in answer to the complaint states as follows:

COUNT I

1. Defendant admits the allegations contained in paragraph 1 of Count I of plaintiff's complaint.
2. Defendant admits the allegations contained in paragraph 2 of Count I of plaintiff's complaint.
3. Defendant denies the allegations contained in paragraph 3 of Count I of plaintiff's complaint and affirmatively asserts that under the applicable provisions of the Social Security Act plaintiff is not entitled to bring this action as a class action.
4. Defendant admits the allegations contained in paragraph 4 of Count I of plaintiff's complaint.
5. Defendant admits the allegations cotnained in paragraph 5 of County I of plaintiff's complaint but states that the request for a hearing was filed on July 30, 1970.
6. Defendant admits the allegations contained in paragraph 6 of Count I of plaintiff's complaint but states that the hearing was held on November 16, 1970.

7. Defendant admits the allegations contained in paragraph 7 of Count I of plaintiff's complaint.

8. Defendant admits the allegations contained in paragraph 8 of Count I of plaintiff's complaint.

9. Defendant lacks sufficient knowledge on which to form a belief as to the truth of the allegations contained in paragraph 9 of Count I of plaintiff's complaint.

10. Defendant denies the allegations contained in paragraph 10 of Count I of plaintiff's complaint.

## COUNT II

1. Defendant admits the allegations contained in paragraph 1 of Count II of plaintiff's complaint.

2. Defendant admits the allegations contained in paragraph 2 of Count II of plaintiff's complaint.

3. Defendant denies the allegations contained in paragraph 3 of Count II of plaintiff's complaint and affirmatively asserts that under the applicable provisions of the Social Security Act plaintiff is not entitled to bring this action as a class action.

4. Defendant admits the allegations contained in paragraph 4 of Count II of plaintiff's complaint.

5. Defendant admits the allegations contained in paragraph 5 of Count II of plaintiff's complaint but states that the request for a hearing was filed on July 30, 1970.

6. Defendant admits the allegations contained in paragraph 6 of Count II of plaintiff's complaint but states that the hearing was held on November 16, 1970.

7. Defendant admits the allegations contained in paragraph 7 of Count II of plaintiff's complaint.

8. Defendant lacks sufficient knowledge on which to form a belief as to the truth of the allegations contained in paragraph 8 of Count II of plaintiff's complaint.

9. Defendant denies the allegations contained in paragraph 9 of Count II of plaintiff's complaint.

FURTHER ANSWERING the allegations contained in Count I and Count II of plaintiff's complaint defendant affirmatively asserts that plaintiffs are not entitled to the relief for which they pray under the applicable provisions of the Social Security Act, that plaintiffs are not entitled to

bring this action as a class action, that plaintiffs are not entitled to an injunction or a declaratory judgment, under the terms of the Social Security Act, and that the decision denying plaintiffs' application for relief is correct and in accord with applicable law and regulations.

FURTHER ANSWERING defendant affirmatively asserts that the findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive; and in support of such affirmative assertion and in accordance with the provisions of Title 42, United States Code, Section 405(g), the defendant files herein as a part of the answer a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based.

WHEREFORE, the defendant prays that this Court affirm the decision of the Secretary of the Department of Health, Education and Welfare, which decision was made in accordance with applicable statutes and regulations of the Social Security Act, and accordingly prays for judgment dismissing the complaint with costs awarded to the defendant together with such other and further relief as this Court may deem just and proper.

WILLIAM J. BAUER
United States Attorney

MGE:dma

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1436

MAGDALENA JIMENEZ, by RAMON JIMENEZ, her father and next friend, individually and on behalf of all others similarly situated, and EUGENIO JIMENEZ and ALICIA JIMENEZ, by RAMON JIMENEZ, their father and next friend, individually and on behalf of all other similarly situated, PLAINTIFFS

*vs.*

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare, DEFENDANT

---

No. 71 C 2628

ROBIN BOOKER, by FRANCINE BOOKER, her mother and next friend, PLAINTIFF

*vs.*

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare, DEFENDANT

MEMORANDUM OPINION AND JUDGMENT ORDER

These consolidated cases challenge the constitutionality of two sections of the Social Security Act inasmuch as they discriminate against a particular class of illegitimate children. A three-judge panel has heard plaintiffs' claims, jurisdiction for which is based upon 42 U.S.C. § 405(g) (1970). For the reasons stated below, this court grants defendant's motion for summary judgment and dismisses both cases.

Social Security benefits may be obtained on behalf of the children of an insured individual entitled to disability or death benefits under the Act. 42 U.S.C. § 402

(d) (1970). In determining whether an applicant is the child of an insured, 42 U.S.C. § 416(h) establishes three independent tests. First, an applicant is the child of an insured if he can inherit the insured's personal property under the law of intestate succession of the state of the insured's domicile. 42 U.S.C. § 416(h)(2)(A) (1970). Second, an applicant is the child of an insured if his parents went through a marriage ceremony that resulted in a purported, but nevertheless invalid, marriage. The invalidity must have been caused by a defect in the marriage procedure or by the failure of one of the parents to dissolve a prior marriage. 42 U.S.C. § 416(h)(2)(B) (1970). The third statutory definition of child encompasses those of the insured's issue who do not come within the first two provisions. An applicant for benefits is a child under 42 U.S.C. §416(h)(3)(B) if before the commencement of the insured's period of disability (1) he made an written acknowledgement that the applicant is his child, or (2) a court decree established the insured's paternity of the applicant, or (3) a court has ordered the insured to support the applicant because of paternity, or (4) if the Secretary finds sufficient evidence that the insured is the parent of the applicant and contributed to his support when the disability began. It is the treatment of this third class of children that is challenged in the instant case.

As noted above, 42 U.S.C. § 416(h)(3)(B) requires that the applicant be a child of the insured when his disability began. Ramon Jimenez has three illegitimate children, Magdalena, Alicia and Ramon, Jr. Because Alicia and Ramon, Jr. were born after their father became disabled, they are not considered his children under § 416(h)(3)(B) and may not claim benefits under the Act, even though Ramon, Sr. has supported and acknowledged them as his own. The situation of Magdalena Jimenez and Robin Booker is different from that of Alicia and Ramon, Jr. in that both of these illegitimate children were born to their parents before the disability commenced. However, they were not entitled to receive benefits because their families exceeded the maximum benefit limitations of 42 U.S.C. § 403(a) (1970). Although

the validity of § 403(a) was originally a substantial part of these lawsuits, the Supreme Court recently affirmed two three-judge court rulings which held § 403(a) unconstitutional.[1] Since we have no reason to believe that the Social Security Administration will fail to comply with those decisions,[2] a controversy no longer exists between defendant and plaintiffs Robin Booker and Magdalena Jimenez. Hence, their complaints are dismissed as moot and the subsequent scope of this opinion shall be limited to the constitutionality of § 416(h)(3)(B).

Prior to 1965, children who presently come within the § 416(h)(3)(B) definition of children were entirely excluded from receiving any benefits under the Act, even though the Act thereby discriminated between different classes of illegitimates.[3] In 1965, Public Law 89-97 added paragraph (3) to subsection (h) of § 416 and for the first time an entire category of illegitimate children became entitled to receive benefits through a parent's Social Security account, subject to the now challenged restriction that the event which triggered a child's entitlement (e.g., court decree or written acknowledgment) must occur before the onset of the insured's disability. It is clear that, both before and after the amendment, the statute does not simply discriminate against *all* illegitimate children, for a child could be born out of wed-

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[1] *Griffin* v. *Richardson*, Par. 16,759 CCH Unemployment Insurance Reports (D.Md. July 16, 1972), *aff'd*, 72-655, 41 U.S.L.W. 3340, December 18, 1972; *Davis* v. *Richardson*, 342 F.Supp. 588 (D.Conn. 1972), *aff'd*, 72-241, 41 U.S.L.W. 3340, December 18, 1972. *Accord*, *Maracle* v. *Richardson*, 41 U.S.L.W. 2197 (D.D.N.Y. September 21, 1972); *Morris* v. *Richardson*, 41 U.S.L.W. 2061 (N.D.Ga. July 20, 1972).

[2] Prior to the Supreme Court's disposition of the cases cited in note 1, *supra*, the Social Security Administration stated that it would refrain from following § 403(a) pending appeal of the decisions declaring it unconstitutional. *SSA Program Circular* No. 199, September 29, 1972.

[3] This exclusion was consistently upheld by the courts, although the precise question of its constitutionality does not appear to have been raised. *E.g.*, *Warrenberger* v. *Folsom*, 239 F.2d 846 (3d Cir. 1956); *Robles* v. *Folsom*, 239 F.2d 562 (2d Cir. 1956), *cert. denied*, 353 U.S. 960 (1957).

lock and hence illegitimate, yet nevertheless qualify under the first two statutory definitions of "child" contained in § 416(h)(2)(A) and (B). Thus, the statute effectively creates two categories of illegitimates and treats each differently.

Defendant urges us to uphold the constitutionality of this restriction because it is a reasonable means of preventing spurious claims. Plaintiffs assert that this restriction is an unconstitutional denial of due process because it is not rationally related to the objectives of the Social Security Act and because there are less restrictive alternatives available to prevent spurious claims. In considering these arguments, this court may not substitute its judgment of social policy for that of the legislature, but rather must consider whether Congress has the *power* to discriminate between classes of illegitimates as it has done in the Social Security Act. *Dandridge* v. *Williams*, 397 U.S. 471, 486 (1970).[4]

The power of Congress to discriminate is limited by the due process clause of the fifth amendment, which includes the principle of equal protection when a federal statute discriminates in an invidious manner or deprives persons of their fundamental constitutional rights. *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). In analyzing an alleged denial of equal protection, the Supreme Court has utilized basically two tests depending on the type of interest involved. *See generally Developments in the Law* EQUAL PROTECTION, 82 Harv. L. Rev. 1065 (1969). The traditional test consists of a two-part inquiry that first identifies the

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[4] As the Court states in *Flemming* v. *Nestor*, 363 U.S. 630, 611 (1961): "In judging the permissibility of the cut-off provisions of § 202(n) [of the Social Security Act] . . ., it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom.' *Helvering* v. *Davis*, [301 U.S. 619 (1937)] at 644."

purposes or objectives of a legislative scheme and then asks whether the challenged discrimination bears a rational relationship to one of those purposes. Moreover, the purpose need not have been a main objective of the statute or even one that the leigslators had in mind when they passed it. *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). The second test, that of the compelling state interest, is not applicable in this case because the Supreme Court has held that a challenged discrimination involving public welfare benefits must stand if it is "rationally based and free from invidious discrimination." *Dandridge* v. *Williams*, *supra* at 487 (1970). *Accord*, *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v. *Belcher*, *supra*; *Flemming* v. *Nestor*, *supra*. Therefore, inasmuch as § 416(h)(3) affects an interest in welfare benefits, it must be considered valid unless it is shown to be irrational and invidious.

However, in addition to asserting an interest in public welfare benefits, plaintiffs also assert an independent constitutional right to be free from a classification based solely upon their status at birth. They claim that this classification is subject to the compelling state interest test commonly found in racial discrimination cases such as *Bolling* v. *Sharpe*, *supra*. But, an examination of recent Supreme Court decisions on the rights of illegitimates convinces us that no such standard is applicable to a legislative classification based on legitimacy at birth and that this interest is also subject to the traditional rational relationship test.[5] *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Labine* v. *Vincent*, 401 U.S. 532 (1971); *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968); *Levy* v. *Louisiana*, 391 U.S. 68 (1968). Furthermore, the fact that § 416

[5] As indicated at note 1, *supra*, it is unconstitutional to discriminate against children falling within § 416(h)(3)(B) by eliminating their benefits in the manner prescribed by § 403(a). In three out of the four cases cited in note 1 the courts reached that result by aplying the traditional rational relationship test. In *Griffin* v. *Richardson*, *supra*, the court held that § 403(a) was unconstitutional under either the traditional standard or the compelling state interest test. Thus, our reliance upon the traditional test seems well-placed, despite the fact that our holding vindicates the constitutionality of the discrimination in this notably different context.

(h) (3) (B) does not apply to all illegitimate children but only to a well-defined category of them distinguishes this case from those just cited and from the Court's recent decision in *Gomez* v. *Perez*, 41 U.S.L.W. 4174 (Jan. 17, 1973), suggesting that factors other than illegitimacy might account for the discrimination here.

The Social Security Administration has asserted that the prevention of spurious claims is a factor that rationally supports the distinction made in § 416(h) (3) (B) because the purpose of the Act is to replace the support lost by a child when his father becomes disabled. *Watts* v. *Veneman*, 334 F.Supp. 482, 486 (D.D.C. 1971). *Accord*, *Hagler* v. *Finch*, 451 F.2d 45 (9th Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *Perry* v. *Richardson*, 445 F.2d 677 (6th Cir. 1971). We agree. In the letters filed with this court subsequent to oral argument, the Administration cited examples which make it clear to us that, given the knowledge of the Act's provisions absent § 416(h) (3) (B), an insured would have both the opportunity and the financial temptation to file a spurious claim after his disability began. Thus, an insured's cash payments on account of his disability or old age can be increased by as much as one-half his individual entitlement, if he is able to claim one child as his dependent. To the unscrupulous person, all that prevents him from realizing such a gain is the mere formality of a spurious acknowledgement of paternity or a collusive paternity suit with the mother of an illegitimate child who is herself desirous or in need of the additional cash. Since a child's benefits are paid to the parent having custody of the child as "representative payee," the principals to such a scheme would have no trouble in realizing the fruits of their illegal venture. Moreover, collusive paternity suits and fraudulent acknowledgements of paternity would be extremely difficult to detect whether the Administration continued to rely upon its present procedures or was forced by this lawsuit to seek alternatives to § 416(h) (3) (B).[6]

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[6] The practical difficulties of proof in these situations have not escaped judicial attention. *See e.g.*, *Jerry Vogel Music Co.* v. *Edward B. Marks Music Corp.*, 425 F.2d 834, 836 n.4 (2d Cir. 1969).

On the other hand, the requirement that § 416(h)(3)(B) children be born before the onset of their parent's disability is based on the very simple, self-evident assumption that a person with nothing to gain from a spurious acknowledgement of paternity is not as likely to do so as one who could thereby increase his monthly income by one-half. Indeed, the probability is slight that an insured would make a spurious acknowledgment in anticipation of becoming disabled sometime in the future.

To this plaintiffs reply that the inter-personal consequences of such an acknowledgement are sufficient to discourage all but a few spurious claims and that the hardships befalling children like Alicia Jimenez and Ramon Jimenez, Jr. outweigh the adverse effects of a few fraudulent claims. They do not dispute the fact that the prevention of such abuse is a valid reason to discriminate, *Hagler* v. *Finch*, *supra*, but rather assert that there are less restrictive means of accomplishing this objective. However, even if such measures existed, their use is not constitutionally mandated under traditional notion of equal protection. Moreover, although plaintiffs assert that more restrictive regulations and internal administrative procedures could reduce such claims, they have not told us just how the Social Security Administration is to detect a collusive paternity suit or fraudulent acknoweldgment of paternity. Surely the parties to the collusion, who are in pari delicto, have little incentive to come forward and confess the error of their ways. And it would truly be the exceptional father who, having sired a child out of wedlock, would subsequently come forward, acknowledge his real paternity, and seek to have his child removed from the rolls of public welfare.

In sum, it must be remembered that plaintiffs bear the burden of proving § 416(h)(3)(B) to be an irrational means of preventing spurious claims. At best they have merely asserted that there are better ways to do so. That these plaintiffs may in fact be the children of Ramon Jimenez, Sr. suggests that it might have been more benevolent for Congress to allow them to share in these benefits. However, the question before us is one of congressional power and not wisdom. Having found § 416

(h) (3) (B) to be rational, we cannot second guess congressional wisdom even as applied to these particular facts. Since neither this nor any other court should alter a legislative judgment until convinced that Congress lacks the power to do what it has done, § 416(h) (3) (B) should be considered a valid exercise of legislative judgment until there exists convincing proof to the contrary.

Case dismissed.

/s/ Richard B. Austin
Honorable RICHARD B. AUSTIN
United States District Court

/s/ Bernard M. Decker
Honorable BERNARD M. DECKER
United States District Court

DATED: JANUARY 30, 1973

No. 71-C-1436, 71-C-2628

FAIRCHILD, *Circuit Judge* (dissenting). I respectfully dissent from the dismissal of the claims of Eugenio and Alicia Jimenez (the children born after Ramon's disability began). Legitimate children born after the beginning of disability, and otherwise qualified, would receive benefits, as would children born before the beginning of disability, whether legitimate or illegitimate. But no matter how clearly it can be shown that Eugenio and Alicia are the dependent children of Ramon, the statute excludes them from benefits which it grants to legitimate children otherwise similarly situated. I realize that a child who is unable to establish paternity with the certainty we accord to a child born to a married mother may properly be required to supply proof achieving a particular level of certainty, but this statutory exclusion is absolute, without regard to the certainty with which paternity might be proved.

I believe this exclusion of a class of dependent children from social security benefits effected by 42 U.S.C. § 416 (h) (2) and (3) to be constitutionally impermissible discrimination.

Recent decisions of the Supreme Court make it clear that statutory compensation schemes may not, in awarding benefits, prefer one class of dependent children over another according to their status of birth. *Weber* v. *Aetna Casualty & Surety Co.* 406 U.S. 164 (1972); *Richardson* v. *Davis*, 41 L.W. 3345 (1972), affirming *Davis* v. *Richardson*, 342 FSupp. 588 (1972); *Richardson* v. *Griffin*, 41 L.W. 3345 (1972); affirming *Griffin* v. *Richardson*, ¶ 16,759 CCH Unemployment Insurance Reports (D. Md., July 16, 1972). Significantly, the Court was not unmindful in these cases that children born out of wedlock presented difficult problems of proof as to actual dependency. In *Weber*, the Court indicated that they would respect a state's method of determining the genuineness of individual claims. However, the Court made it clear that once dependency was established, the Constitution required that all dependents—whether legitimate or illegitimate—must be treated equally. 406 U.S. at 175.

In a very recent decision invalidating state discrimination against illegitimate children in a system designed to provide for the needs of children generally, the Supreme Court said: "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez* v. *Perez*, —— U.S. ——, 41 L.W. 4174, 4175, January 17, 1973.

The sole justification offered for the total exclusion of a class of dependent children [1] is that there may reasonably be thought to be a greater likelihood of plausible spurious claims among applicants born after the event which triggers entitlement of an alleged father to benefits.[2]

While I would agree that the need to guard against fraudulent claims is surely a valid legislative goal, I cannot agree that a total exclusion of a class of claims,—some of which will be demonstrably valid,—is a reasonable means of achieving that goal.

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[1] As the majority opinion makes clear, eligibility for social security children's benefits is not statutorily defined simply according to the status and time of birth. Nevertheless, I believe, in operation, § 416(h)(2) and (3), excludes from eligibility virtually all children of an insured individual who are born out of wedlock after the entitling event. It has never been suggested by the Secretary that even a significant percentage of this class will be able to establish their eligibility under § 416(h)(2)(A) and (B).

[2] This proposition is itself subject to question. Assuming that paternal acknowledgement is required, a number of factors must coalesce in producing a spurious but plausible claim. The insured individual must be willing to falsify in the face of criminal penalties and the societal and interpersonal condemnation to which he will be exposed. He must be willing to expose himself to legal obligations of support. The child's birth and the mother's situation must be consistent with the paternity asserted. And the mother must be willing to falsify. On the other hand, advances in the ability to exclude paternity as a result of blood tests greatly increase the possibility of dectecting spurious claims. Studies suggests that if a sufficient number of blood typing tests are utilized, "the average chance of obtaining an exclusion may eventually reach 80 to 90 per cent." Kramer, *Illegitimacy: Law and Social Policy*, Chapter 4, Part H, sub-part (i); Blood Typing (1971), pp. 123-127.

*Carrington* v. *Rash*, 380 U.S. 89, 92-97 (1965) establishes the principle that a statutory classification which totally excludes a class of persons from important benefits denies equal protection when less drastic means are available to effectuate the interest purportedly promoted by the classification. I think this principle is applicable here. In the context of a statutory compensation scheme, the total exclusion of a class of dependent children is simply too drastic a means to cope with the problem of spurious claims.

It is my opinion that insofar as portions of § 416(h)(3) constitute a requirement that an applicant be borne before the beginning of disability of an insured who is alleged to be the applicant's father, they are discriminatory and invalid. I would enjoin application of this requirement to plaintiff Eugenio and Alicia and others similarly situated.

I join Judge Austin and Judge Decker in the decision with respect to Magdalena Jimenez and Robin Booker.

SUPREME COURT OF THE UNITED STATES

No. 72-6609

EUGENIO AND ALICIA JIMENEZ, ETC., APPELLANTS

*v.*

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

December 3, 1973

SUPREME COURT OF THE UNITED STATES

No. 72-6609

EUGENIO AND ALICIA JIMENEZ, ETC., APPELLANTS

*v.*

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 3, 1973

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 530232 151

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-6609

EUGENIO AND ALICIA JIMENEZ, ET AL., APPELLANTS

*v.*

CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION AND WELFARE

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

---

## MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) and (d) of the Rules of this Court, the appellee moves that the judgment of the district court be affirmed.

1. Appellant Ramon Jimenez brought this action in the United States District Court for the Northern District of Illinois for review of a final decision by the Secretary of Health, Education and Welfare denying child's insurance benefits to two of his illegitimate children because they were born after his period of disability began, and therefore could not qualify for benefits under 42 U.S.C. 416(h)(3)(B). Benefits had been granted to a third illegitimate child, Magdalena, who was born before the period of disability began. A three-judge court rejected appellant's contention that the Social Security Act requirement that illegitimate children not otherwise qualifying for benefits must show depen-

dency on the wage earner at the time of his disability violated Due Process requirements (353 F. Supp. 1356).

The court held that Social Security Act provisions were valid if reasonably related to a legitimate purpose of the Act, rather than only if supportable under the "compelling state interest" test, as appellants contended. *Dandridge* v. *Williams,* 397 U.S. 471, 487; *Jefferson* v. *Hackney,* 406 U.S. 535; *Richardson* v. *Belcher,* 404 U.S. 78; *Flemming* v. *Nestor,* 363 U.S. 603. The district court distinguished recent decisions of this Court disapproving certain discriminations against all illegitimates, noting that the classification in 42 U.S.C. 416(h)(3)(B) does not apply to all illegitimate children, "but only to a well-defined category of them * * * suggesting that factors other than illegitimacy might account for the discrimination here." 353 F. Supp. at 1360. The court found that a disabled Social Security recipient could increase his benefits by up to 50 percent by acknowledging an illegitimate child, and stated (353 F. Supp. at 1361):

> [T]he requirement that §416(h)(3)(B) children be born before the onset of their parent's disability is based on the very simple, self-evident assumption that a person with nothing to gain from a spurious acknowledgment of paternity is not as likely to do so as one who could thereby increase his monthly income by one-half.

2. The case presents the same issue as *Weinberger* v. *Beaty,* in which we are simultaneously filing a Jurisdictional Statement challenging the decision of the Court of Appeals for the Fifth Circuit that the statutory provisions involved are invalid. As there developed, and as the district court here held, the challenged provisions of the Social Security Act bear a rational

relationship to the accomplishment of the aims of the Social Security system, and accordingly are constitutional. We therefore submit that the judgment of the district court upholding the statute should be affirmed. We suggest, however, that the Court should defer acting on this appeal until it has decided the *Beaty* case.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1973.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6609

Supreme Court, U.S.
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MICHAEL RODAK, JR.

EUGENIO and ALICIA JIMENEZ, by their father and next friend, RAMON JIMENEZ, *et al.*,

*Appellants,*

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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# TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| QUESTION PRESENTED | 4 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 7 |
| I. Section 216(h)(3) of the Social Security Act Discriminates Against After-Born Illegitimate Children by Denying Them Social Security Benefits | 9 |
| II. The Discrimination Worked by Section 216(h)(3) Violates the Right of After-Born Illegitimate Children to Due Process of Law Because It Is Not Rationally Based and Is Not Consistent With the Purpose of the Social Security Act | 15 |
| A. This Court Has Consistently Held That Discrimination Against Illegitimate Children Is a Violation of Equal Protection Guarantees | 21 |
| B. Blanket Exclusion of the Entire Classification of After-Born Illegitimate Children for the Purpose of Preventing Fraud Is Not a Suitable Means of Furthering an Appropriate Governmental Interest | 27 |
| C. The Relative Likelihood of Support for all Illegitimate Children Is Irrelevant Because the Statutory Scheme Requires That Each Individual Applicant Prove His Eligibility | |

Page

and Because Actual Receipt of Support Is Not Determinative of Eligibility . . . . . 36

III. The Discrimination Against Illegitimate Children Worked by Section 216(h)(3) Must Be in Furtherance of a Compelling Governmental Interest in Order to be Constitutionally Acceptable . . . . . 38

A. Illegitimacy Is a Suspect Classification . . . . . 39

B. The Discrimination Against After-Born Illegitimate Children Is Not Crucial to the Promotion of a Compelling Governmental Interest and So Must Be Found Unconstitutional . . . . . 43

CONCLUSION . . . . . 44

## TABLE OF CITATIONS

*Cases:*

Allison v. Celebrezze, 238 F. Supp. 667 (W.D.S.C. 1964) . . . . . 17

Bell v. Burson, 402 U.S. 535 (1971) . . . . . 35

Bolling v. Sharpe, 347 U.S. 497 (1954) . . . . . 8

Carrington v. Rash, 380 U.S. 89 (1965) . . . . . 28

Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972), *aff'd*, 409 U.S. 1069 (1972) . . . . . *passim*

Delno v. Celebrezze, 347 F.2d 159 (9th Cir. 1965) . . . . . 16

Dunn v. Blumstein, 405 U.S. 330 (1972) . . . . . 32

Eisenstadt v. Baird, 405 U.S. 438 (1972) . . . . . 32

Frontiero v. Richardson, 411 U.S. 677 (1973) . . . . . *passim*

Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73 (1968) . . . . . 21, 22, 23

Page

Gomez v. Perez, 409 U.S. 535 (1973) . . . . . 8, 21, 24, 25, 26, 28

Graham v. Richardson, 403 U.S. 365 (1971) . . . . . 41

Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), *aff'd*, 409 U.S. 1069 (1972) . . . . . 2, 8, 20, 21, 25

Heiner v. Donnan, 285 U.S. 312 (1932) . . . . . 34

Hirabayashi v. U.S., 320 U.S. 81 (1942) . . . . . 40, 41

Howard v. Weinberger, (D. Minn. Civil Action No. 4-71-Civ.-301 (Aug. 9, 1973) . . . . . 9

Hunter v. Erickson, 393 U.S. 483 (1969) . . . . . 41

Korematsu v. U.S., 323 U.S. 214 (1944) . . . . . 40

Kramer v. Union Free School District, 395 U.S. 621 (1969) . . . . . 43

Labine v. Vincent, 401 U.S. 532 (1971) . . . . . 21, 23, 24, 30

Levy v. Louisiana, 391 U.S. 68 (1968) . . . . . 21, 22, 26

Mayers v. Ridley, 465 F.2d 630 (D.D.C. 1972) . . . . . 31

McLaughlin v. Florida, 379 U.S. 185 (1964) . . . . . 40

Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972) . . . . . 39

New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) . . . . . 8, 21, 24, 26

Oyama v. California, 332 U.S. 633 (1948) . . . . . 40, 43, 44

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) . . . . . 16

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) . . . . . 42

Severance v. Weinberger, 362 F. Supp. 1348 (1973) . . . . . 9, 39

Shapiro v. Thompson, 394 U.S. 618 (1969) . . . . . 8, 36

Stanley v. Illinois, 405 U.S. 645 (1972) . . . . . 28, 35

Sugarman v. Dougall, ____ U.S. ___, 37 L. Ed.2d 853 (1973) . . . . . 36

Page

United States v. Carolene Prod. Co., 304 U.S. 144 (1938) ..... 42

United States v. Romano, 382 U.S. 136 (1965) ..... 34

U.S. Dept. of Agriculture v. Moreno, ____ U.S. ____, 37 L. Ed.2d 782 (1973) ..... 31, 32, 33

U.S. Dept. of Agriculture v. Murry, ____ U.S. ____, 37 L. Ed.2d 767 (1973) ..... 34, 35

Vlandis v. Kline, 410 U.S. ____, 37 L. Ed.2d 63 (1973) ..... 35

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) ..... *passim*

Weinberger v. Beaty, 478 F.2d 300 (1973) (pending on appeal) ..... 9, 39

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ..... 16

*Miscellaneous:*

"Development of the Law of Equal Protection," 82 *Harv. L. Rev.* 1065 (1969) ..... 40

Foder, "Emotional Trauma Resulting from Illegitimate Birth," 54 *Archives of Neurology and Psychiatry* 381 (1945) ..... 41

House-Senate Conference Comm. Rep. on 1965 Amendments to Social Security Act, 111 Cong. Rec. 18387 (July 27, 1965) ..... 18

"Illegitimacy," Vol. 7, *Encyclopedia of the Social Sciences*, 579 (1935) ..... 41

Krause, Harry, *Legitimacy: Law and Social Policy*, Bobbs-Merrill, 1971 ..... 41

Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement, Washington, D.C. 1965 ..... 18

Page

*Social Security Handbook*, SSI-135, 1969 §1700ff ..... 33

Social Security Administration's Claims Manual, §2431ff ..... 33

Statistical Abstracts of the United States, 1973, 94th Annual Edition, U.S. Dept. of Commerce ..... 42

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 72-6609

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EUGENIO and ALICIA JIMENEZ, by their father and next friend, RAMON JIMENEZ, *et al.*,

*Appellants,*

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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## BRIEF FOR APPELLANTS

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## OPINION BELOW

The opinion of the United States District Court is reported at 353 F. Supp. 1356, *sub nomine Jimenez v. Richardson.* The opinions of the Hearing Officer and Appeals Counsel of the Social Security Administration of the Department of Health, Education and Welfare are nowhere reported.

## JURISDICTION

This suit was brought in the United States District Court, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. §405(g), seeking review of a final decision of the Secretary of Health, Education and Welfare. The Judgment of the duly convened three-judge panel of the District Court was entered on January 30, 1973, and notice of appeal was filed in that Court on February 22, 1973. The jurisdiction of the Supreme Court to hear this appeal is conferred by Title 28, United States Code, Section 1253. *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); and *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972).

## THE STATUTE INVOLVED

The statute involved in this suit, Section 216(h)(3) of the Social Security Act, 42 U.S.C. §416(h)(3) provides:

> (3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
>
> (A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)–
>
> (i) such insured individual–
>
> (I) has acknowledged in writing that the applicant is his son or daughter,
>
> (II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgement, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained age 65, whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he was entitled to old-age insurance benefits–

(i) such insured individual–

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgement, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began;

(C) in the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or,

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

## QUESTION PRESENTED

Does Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) deny to illegitimate children their rights to due process of law guaranteed by the Fifth Amendment because it requires such illegitimate children, unlike any legitimate children, to have been born and to have established paternity before their fathers became disabled?

## STATEMENT OF THE CASE

Ramon Jimenez is a wage earner insured by the Social Security Act. In October, 1963, he became entitled to disability insurance benefits for himself and his dependents on the basis of a "period of disability" beginning

April 1, 1963. He had been married in about 1937 and as of 1963 had five minor, legitimate children. His wife was entitled to and received wife's insurance benefits and his legitimate children were entitled to and received children's insurance benefits, beginning in 1963.

Several years earlier Ramon Jimenez had separated from his wife, and in about 1961 had begun living with Elizabeth Hernandez, whom he has never married. Elizabeth and Ramon had three children, Magdalena, born August 13, 1963, Eugenio, born January 18, 1965, and Alicia, born February 24, 1968. These three children have lived with Ramon Jimenez all their lives; he has formally acknowledged them to be his children, has supported and cared for them since their birth, and has in fact been their sole caretaker since their mother left the household late in 1968.

On August 21, 1968, Ramon Jimenez filed an application for child's insurance benefits on behalf of these three children. Magdalena was found entitled to child's insurance benefits.[1] However, the claims of Eugenio and Alicia were denied on the grounds that they did not meet the requirements of 42 U.S.C. §416(h)(3), since neither child's paternity had been acknowledged or confirmed through evidence of domicile and support before the onset of their father's disability, an obviously impossible requirement because neither child had been born at that time. In all other respects Eugenio and Alicia are eligible to receive child's insurance benefits; their applications

[1] Although she was born after the onset of her father's disability, she had been conceived and was in being and living with and being supported, in utero, by her father, before he became disabled.

were denied only because they are illegitimate children whose dates of birth come after the onset of their father's disability. (All of the facts herein can be found in the Hearing Examiner's Decision, App., pp. 3-8).

Ramon Jimenez appealed this denial throughout the administrative hierarchy of the Social Security Administration, but his claim on behalf of his children was repeatedly denied. He subsequently brought an action on their behalf in the United States District Court, attacking the constitutionality of the section upon which the Social Security Administration relied in denying children's benefits to Eugenio and Alicia. The United States District Court upheld the constitutionality of 42 U.S.C. §416(h)(3) and dismissed the suit. It is from that dismissal that this appeal is taken.

## SUMMARY OF ARGUMENT

Appellants contend that Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) violates their right to equal protection of the laws, as guaranteed by the due process clause of the Fifth Amendment, by requiring that illegitimate children, as opposed to legitimate children, be born (and acknowledged, or living with or supported by, their fathers) before the onset of the fathers' disability or old age in order to receive Social Security benefits.

This discrimination against after-born illegitimate children created by Section 216(h)(3) is arbitrary and irrational and bears no rational relation to the purpose of the Social Security Act, which is to provide support to wage earners and their dependents when the wage earners can no longer work due to old age, disability, or death.

The discrimination against illegitimate children herein is perfectly analogous to those instances of discrimination

against illegitimate children which have been found unconstitutional by this Court in several recent cases.

The justifications for the discrimination offered by the Government and in one instance relied upon by the District Court–that §416(h)(3) children as a group are less likely to have been supported by their fathers than other children, and that the classification is necessary to prevent fraudulent claims–are constitutionally inadequate and incorrect, irrelevant and misleading.

These justifications amount essentially to an argument for administrative efficiency, which alone cannot justify blanket discrimination against an entire class of potential recipients. An irrebuttable presumption, often contrary to fact, lacking a reasonable relation between the known fact and the presumed one, and irrevocably excluding many otherwise fully eligible applicants, is a violation of due process.

Illegitimacy is and should be treated as a suspect class, since it is an accident of birth, like race and national origin, over which the individual concerned has no control, and because illegitimate children suffer severe social opprobrium and are politically powerless. Since illegitimacy is a suspect class, discrimination against illegitimates can be justified only by a compelling governmental interest. No such compelling interest exists or has been suggested by the appellee.

## ARGUMENT

Eugenio and Alicia Jimenez are illegitimate children, acknowledged by and living with their disabled wage-earner father. They were born after he became disabled. They have been denied child's insurance benefits, based on the requirement, in section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)), that they, and all

other illegitimate children defined therein, have to have been acknowledged or supported, *before* the onset of their wage-earner father's disability (or old age)[2] in order to qualify for such benefits. Since they were in fact born after the onset of their father's disability, they and other dependent, otherwise eligible children cannot possibly comply with this requirement. This arbitrary and irrational exclusion of a class of children from Social Security benefits, imposed only on illegitimate children, violates the right of those children to due process of law,[3] as this Court has determined in affirming orders in *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); and *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972); and in overturning state laws that similarly discriminated against illegitimate children, e.g., *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), *Gomez v. Perez*, 409 U.S. 535 (1973), and *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973). Several courts have recognized that section 216(h)(3) is unconstitutional as applied to after-born

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[2] Ramon Jimenez, the father of Eugenio and Alicia Jimenez, is disabled, and his children have been denied benefits specifically pursuant to section 216(h)(3)(B) concerning children of *disabled* wage earners, but the same pre-eligibility requirement appears in section 216(h)(3)(A) concerning children of "aged" wage earners, and so references are made herein to both disability and old age.

[3] It is well established that the Due Process Clause of the Fifth Amendment includes a guarantee of equal protection of the laws as strong as that stated explicitly in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972).

illegitimates. In *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit held unconstitutional section 216(h)(3) because of its discriminatory treatment of illegitimate children born after their fathers became disabled. That case is now pending on appeal before this Court (No. 73-521). In *Howard v. Weinberger* (D. Minn. Civil Action No. 4-71-Civ-301 (Aug. 9, 1973), the court made the same ruling. And in *Severance v. Weinberger*, 362 F. Supp. 1348 (D.D.C. 1973), a three-judge district court held unconstitutional that portion of section 216(h)(3) that excluded from benefits those illegitimate children born before their father's 65th birthday.

## I.

## SECTION 216(h)(3) OF THE SOCIAL SECURITY ACT INVIDIOUSLY DISCRIMINATES AGAINST AFTER-BORN ILLEGITIMATE CHILDREN BY DENYING THEM SOCIAL SECURITY BENEFITS.

Children are made eligible for Social Security benefits by section 202(d) of the Social Security Act (42 U.S.C. §402(d)), which in pertinent part provides that "Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits" who "has filed application for child's insurance benefits," and is dependent upon such individual at the time of application shall be entitled to a child's insurance benefit.[4]

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[4] 202(d) (42 U.S.C. §402(d)):

(d)(1) Every child (as defined in section 216 (e)) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual if such child–

Section 216(e) of the Act (42 U.S.C. §416(e)) provides:

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(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 223(d)) which began before he attained the age of 22, and

(C) was dependent upon such individual–

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . .

* * * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) unless, at such time, such individual was not living with or contributing to the support of such child and–

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) shall be deemed to be the legitimate child of such individual . . .

> The term "child" means the child or legally adopted child of an individual.[5]

The somewhat bewilderingly reflexive definition of section 216(e) is amplified by sections 216(h)(2) and (3) which describe how the Secretary is to determine whether an applicant is in fact a "child" of an insured individual. Section 216(h)(2)(A) makes a "child" any child who may inherit his parent's personal property under the law of intestate succession of the State of his parent's domicile;[6] section 216(h)(2)(B) deems an applicant a "child" if his parents went through a marriage ceremony that resulted in a purported, but nonetheless invalid marriage;[7] and section 216(h)(3) deems an

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[5] This section goes on to treat the problems of adopted and stepchildren.

[6] 42 U.S.C. §416(h)(2)(A):

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

[7] 42 U.S.C. §416(h)(2)(B):

> If any applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother

applicant to be a "child" if he was born, and acknowledged in writing, or found by a court to be the child of his father, or was the beneficiary of a court support order, or was living with or being supported by his father, *before the commencement of his insured parent's disability, old age, or death.*

It is this latter route to eligibility that is at issue here. The section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)), states that:

> (3) an applicant who is the son or daughter of a fully or currently insured individual but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such individual if:
>
> (A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)–
>
> (i) such insured individual–
>
> (I) has acknowledged in writing that the applicant is his son or daughter,
>
> (II) has been decreed by a court to be the father of the applicant, or
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> (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

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or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

*and such acknowledgement, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits, or attained age 65, whichever is earlier;* or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant *at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred;*

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he was entitled to old-age insurance benefits–

(i) such insured individual–

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

*and such acknowledgement, court decree, or court order was made before such insured individual's most recent period of disability began;* or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and *was living with or contributing to the support of that applicant at the time such period of disability began;*

(C) in the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or,

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died. (Emphasis added.)

As is apparent from these sections, most children, in order to obtain child's insurance benefits, are either presumed eligible or need only meet certain eligibility requirements at the time the application for benefits is filed on their behalf, regardless of when they first met those requirements. However, those children–illegitimate children–who would prove their relationship with their fathers under Section 416(h)(3), must have been born, and have met the other conditions, before their fathers died or became aged or disabled.[8]

[8]Children born before, but technically meeting the other conditions after the onset of their father's disability or old age, are also excluded by section 216(h)(3), but for purposes of convenience appellants will refer only to those children who are *born* after the onset of disability or "old age."

Eugenio and Alicia Jimenez were born after their father became disabled. They are consequently absolutely barred from eligibility for child's insurance benefits as long as their father is living. It does not help that they are able to prove conclusively that they are the dependent children of Ramon Jimenez; the statute, simply because of the timing of their births, prevents them from offering that proof. If they were legitimate children, they would not have to offer proof of their relationship with their father, and it would not matter whether they had been born before or after he became aged or disabled. If they were illegitimate but had been born before their father became disabled, they would be allowed to offer proof of their actual relationship with their father. Only because they are *illegitimate children born after the onset of their father's disability*, and therefore by definition acknowledged and supported only after the onset of such disability, are they excluded. Section 216(h)(3) thus invidiously discriminates against illegitimate children and a subclass of after-born illegitimate children. This discrimination violates the equal protection guarantees embodied in the Fifth Amendment's Due Process Clause.

## II.

## THE DISCRIMINATION WORKED BY SECTION 216(h)(3) VIOLATES THE RIGHT OF AFTER-BORN ILLEGITIMATE CHILDREN TO DUE PROCESS OF LAW BECAUSE IT IS NOT RATIONALLY BASED AND IS NOT CONSISTENT WITH THE PURPOSE OF THE SOCIAL SECURITY ACT.

Various formulations have been used to measure a statute against the constitutional guarantee of equal protection, but the minimum requirement is that a statutory classification must not be patently arbitrary,

but must bear a rational relationship to a suitable purpose of the Act creating the classification. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1856). Or, as stated in the majority opinion in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972):

> As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.

The classification and exclusion of after-born[9] illegitimate children affected by section 216(h)(3) fails to meet this most basic test and must therefore be found unconstitutional.

The purpose of Title II of the Social Security Act (Old Age, Survivors, and Disability Insurance (OASDI)) is the provision of support to a wage earner and/or his dependents, when by reason of old age, disability, or death the wage earner has lost his earning power.[10] Exclusion of a group of dependents, in this case, after-born illegitimate children, most certainly does not further the governmental interest in providing support for dependents.[11] And to classify those who will be ex-

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[9] For purposes of convenience, children born after the onset of their father's disability or old age will be referred to hereinafter as "after-born" children, and children born before the onset of their father's disability or old age will be referred to as "before-born" children.

[10] *Delno v. Celebrezze*, 347 F.2d 159, 161 (9th Cir. 1965); S. Rep. No. 1669, 1950 U.S. Code Cong. Serv., p. 3288.

[11] Thirty-seven per cent of all dependents of wage earners receiving benefits pursuant to Title II are "children" of wage earners (D.H.E.W., S.S.A., Office of Research and Statistics, Baltimore, prepared June, 1973, Statistics from 12/72), but despite

cluded, will be accorded differential treatment, based on the marital status of the parents of a child applicant and the date of the beginning of the father's Social Security eligibility[12] (wholly irrespective of the child's need of support, experience of support, right to support, or his actual relationship with his father) only heightens the original deviation from the primary governmental interest, for the grounds for such a classification are "patently arbitrary."

A child's need for and right to parental support does not depend on whether his birth occurred before or after the onset of his parent's disability or "old-age." Of course, once a wage earner stops working he can no

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the importance of Social Security insurance to "children," a significant group of potential child recipients is excluded, by the statutes at issue herein.

[12]If the definition of disability for purposes of Title II eligibility were so restrictive, as it is not, that a "disabled" wage earner were unable to father a child, or if age were a barrier to procreation, for men, as it clearly is not, then a valid distinction for purposes of Title II eligibility could perhaps be made between children born before the onset of "old age" or disability and those born after the onset of these conditions. Such a distinction would then be dependent on factors properly relating to Social Security insurance eligibility, assuming that the distinction were applied equally to legitimate and illegitimate children. However, given the fact that a wage earner can easily be so disabled as to be unable to engage in substantial gainful employment, and so be eligible to receive disability benefits, and still be physically able to father a child (see section 223(a) of the Social Security Act (42 U.S.C. §423(a)); 20 C.F.R. §404, Subpart P, Appendix; and, e.g., *Allison v. Celebrezze*, 238 F. Supp. 667 (W.D. South Carolina 1964)), and that a 65 year old is able to father a child, a distinction between children born before or after the onset of these conditions is unrelated to the purposes of the Social Security Act.

longer provide support for his dependents directly from current earnings, so the likelihood of support from current earnings is different after the onset of disability or old age. But under the Social Security Act the relevant factor is not the source of support, or the past receipt of support, but the right to support.[13] A child born after his father becomes disabled needs and has a right to support just as much as his sibling who was born before the onset of their father's disability.

Congress apparently recognized the general irrelevance of the time of birth to the statutory purpose, for no time-of-birth requirements are imposed on legitimate children. Rather, the before-born requirement is imposed only on illegitimate children. The irrationality of the before-born/after-born distinction is clearly illuminated when examined in the narrow context in which it is found. The irrelevant factor of the time of birth relation to the onset of disability or old age is combined with the irrelevant fact of the marital status of the parents to exclude an arbitrary group of hapless children.

If there were a meaningful distinction between before-born and after-born children, it is impossible to understand why that distinction would not be equally significant for legitimate children as for illegitimate

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[13]See section 202(d)(3) under which most children are deemed to be dependent on their parents for purposes of Social Security eligibility, regardless of whether or not they are living with or being supported by their parents. And see House-Senate Conference Comm. Rep. on 1965 Amendments to Social Security Act, 111 Cong. Record 18387 (July 27, 1965) and Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement, at 67 (Washington, D.C. 1965).

children.[14] Whatever meaningful distinction, for purposes of the Social Security Act, between legitimate and illegitimate children there may be, it is impossible to understand how that distinction relates to the time of birth of the child applicant.

The classification created by section 216(h)(3) is thus arbitrary on its face: the requirement that illegitimate children defined in this section must be born before the onset of their father's disability or old age is not in any way reasonably related to the purpose of the Social Security Act. The before-born requirement can therefore be understood only as an arbitrary discrimination against illegitimate children.

Because the discrimination challenged here is one against "after-born" illegitimate children, the government has attempted to distinguish this case from other cases involving illegitimate children on the ground that this case involves only certain and not all illegitimate children. That is a false distinction because in fact *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), one of the leading recent cases on the rights of illegitimate children, concerned only unacknowledged illegitimate children and not all illegitimate children, and this Court held that "[I]t makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy*; the discrimination remains apparent." 406 U.S. 164.[15]

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[14]And surely the distinction would be as true for illegitimate children whose parents have gone through an invalid ceremonial marriage or those who live in states that allow them to inherit from their fathers, made eligible by sections 216(h)(2)(A) and (B).

[15]Subclassifications exist in other contexts. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the classification struck down did not affect all servicewomen; only those whose husbands were dependent on the servicewomen for more than half their support.

Similarly, in *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972), and *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972), not all illegitimate children were barred from benefits–just those children whose legitimate siblings had exhausted the maximum family benefits. In *Griffin* and *Davis*, the "accident of birth" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)) of illegitimacy was coupled with the accident of birth of number and types of siblings. Herein the accident of birth of illegitimacy is coupled with the accident of the birth's timing. In neither event can the Fifth Amendment bar to discrimination against illegitimates be evaded by the subclassification. Such an evasion would legitimize a twofold "accident of birth" as a type of double negative, each accident cancelling out the other. But the two characteristics do not cancel each other out; they are summed to create a bar to benefits. The discrimination effected by section 216(h)(3) is one against illegitimate children: only illegitimate children are subjected to the previously-born requirement, legitimate children are not.

### A. This Court Has Consistently Held That Discrimination Against Illegitimate Children Is a Violation of Equal Protection Guarantees.

This Court has dealt with discrimination against illegitimate children no fewer than eight times in the last six years,[16] and in every case but one[17] has struck down classifications discriminating against illegitimate children as violations of the children's rights to equal protection, under either the Fourteenth Amendment or the Fifth Amendment. Opinions in these cases have not focused on the question of precisely what equal protection standards must be used to judge laws relating to illegitimate children. As will be shown later (*infra*, at 39), the Court appears to be on the verge of holding that statutes creating classifications based on illegitimacy must be subject to strict judicial scrutiny and that the classifications must be necessary to further a compelling governmental interest. Whatever equal protection standards have been applied, the Court has in every case required, at a minimum, that any discrimination against illegitimate children bear a reasonable relation to the overall purpose of the Act in which it is found.

The first two cases that invalidated discrimination against illegitimate children were *Levy v. Louisiana*, 391

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[16] *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guarantee and Liability Ins. Co.*, 391 U.S. 73 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

[17] *Labine v. Vincent*, footnote 16, *supra*.

U.S. 68 (1968) and *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 72 (1968). Both concerned the Louisiana wrongful death statute, which denied recovery to illegitimate children for the death of their mothers, and to mothers for the death of their illegitimate children. The Court struck down the discrimination against illegitimate children in both instances, holding that "legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted." *Levy v. Louisiana*, 391 U.S. 68, 71.

Mr. Justice Douglas wrote, in the majority opinion in *Levy*, that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant" to the harm complained of. 391 U.S. 68, 72. The clear minimal import of these decisions is that the classification of illegitimacy, to be constitutionally acceptable, must be reasonably related to the primary purpose of the law in which it appears.

In *Weber v. Aetna Casualty & Surety*, 406 U.S. 164 (1972), this Court considered the constitutionality of a provision in the Louisiana Workmen's Compensation Act that established recovery rights for unacknowledged illegitimate children different from those granted legitimate children and acknowledged illegitimate children. Petitioners, illegitimate children (by their mother and next friend), claimed workmen's compensation benefits after the death of their father, and were denied benefits because their legitimate half-siblings had exhausted the maximum allowable amount of compensation. The illegitimate children claimed that this preference given to legitimate children violated the Equal Protection Clause of the Fourteenth Amendment. The statute in that case was designed to provide compensatory support for those supposedly, or legally possibly, dependent on a wage earner. And in that case, as it had in 1968 in *Levy*, *supra*,

and *Glona, supra,* the Court recognized that "the fact of a child's birth out of wedlock bore no reasonable relation to the purpose" of statutes involving compensation for loss of support, and therefore struck down the provision. *Weber* at p. 168. The Court based its ruling on an understanding that legitimate and illegitimate children can have essentially identical relationships with and dependencies on their parents, and that their legal status is not therefore a permissible means by which to distinguish between them in the context of a statute relating to dependency:

> An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock, or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate child for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate child all lived in the home of the deceased and were equally dependent upon him for maintenance and support. 106 U.S. 164, 169.

In *Weber*, the dependency and affinity of the illegitimate child were "as great" as those of the legitimate children. In the instant case, the dependency and affinity of the illegitimate children specifically involved herein are greater than that of the legitimate children: Ramon Jimenez lives, alone, with his illegitimate children; he has cared for them all their lives; he has not lived with his legitimate children (who do receive Social Security benefits on his account) for more than ten years. (App. p. 6).

In *Weber* this Court distinguished, on grounds that are equally applicable here, its ruling in *Labine v. Vincent*,

401 U.S. 532 (1971) that Louisiana intestacy laws barring an acknowledged illegitimate child from sharing equally with legitimate children in their father's estate were constitutional. *Labine* is the one case in which the Court has upheld a discrimination against illegitimate children. *Labine*, said this Court, "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." *Weber* at p. 170. Moreover, in *Labine* the statute governing intestate succession was designed to reflect the presumed intent of the decedent who could have modified his daughter's disfavored position by executing a will, and from his failure to do so, might be assumed to possess that intent or at least not to possess a contrary one. In *Weber*, on the other hand, the decedent was legally unable to make his daughter eligible to receive an equal share of workmen's compensation benefits. Similarly, in this case, Ramon Jimenez is unable to make his children Eugenio and Alicia eligible to receive benefits. He has acknowledged them, has always lived with them and provided what support he could for them, but he cannot make them eligible to receive benefits because he cannot change the time of their birth or the time of the onset of his disability. *Labine* is thus inapplicable. It has effectively been limited to its own facts.

In 1972 and 1973 this Court considered five cases concerning the constitutional rights of illegitimates, and after carefully distinguishing *Labine* in the opinion in *Weber*, the Court did not find it necessary to refer to *Labine* again. *Weber* controlled in *Gomez v. Perez*, 409 U.S. 535 (1973), and in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), as it must have in the affirmances in *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069

(1972), and *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972), and as it must here.

In *Griffin v. Richardson, supra,* and *Davis v. Richardson, supra,* the Court again considered the classification of illegitimacy in the context of a statute involving compensation for loss of support. The Court summarily affirmed District Court decisions declaring unconstitutional section 203(a) of the Social Security Act (42 U.S.C. 403(a)), a section that discriminated against exactly the same statutorily defined group of children discriminated against by the requirement challenged here: illegitimate children who would otherwise qualify for Social Security benefits under section 216(h)(3). The section stricken in *Griffin* and *Davis* relegated 216(h)(3) children to secondary status, allowing them to receive benefits only if the statutory "family maximum" benefits were not consumed by legitimate siblings. This Court affirmed decisions in these cases holding that discrimination against illegitimate children, more specifically, discrimination against illegitimate children defined by section 216(h)(3) of the Social Security Act, "is an invidious discrimination, unrelated to the purpose of the law and to any legitimate legislative consideration governing the Social Security Act .... To distinguish [these illegitimate children] from other children with the same needs and the same parent, solely on the basis of a condition of birth ... is impermissible." *Davis v. Richardson*, 342 F. Supp. 588, 593 (1972), *aff'd* 409 U.S. 1069.

Subsequently, *Gomez v. Perez*, 409 U.S. 535 (1973), held that Texas could not constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers while denying that right to illegitimate children. In a *Per Curiam* opinion, the Court broadly declared that "a State may not invidiously

discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U.S. 535, 537.

In *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), this Court's most recent ruling concerning illegitimate children, the plaintiffs challenged a provision of the New Jersey "Assistance to Families of the Working Poor" program, on the grounds that its limitation only to families composed of "two adults of the opposite sex ceremonially married to each other" and their children effectively discriminated against illegitimate children. In its *Per Curiam* ruling, the Court referred to *Weber, supra, Levy, supra, Gomez, supra, Davis, supra,* and *Griffin, supra,* and found that

> Those decisions compel the conclusion that appellants' claim of the denial of equal protection must be sustained. For there can be no doubt that the benefits extended under the challenged program [assistance to families of the working poor] are as indispensable to the health and well-being of illegitimate children as to those who are legitimate. 411 U.S. 619, 620.

It is incontrovertible that the benefits extended under the Social Security Old Age, Survivors, and Disability Insurance program are as necessary to illegitimate children as to those who are legitimate, and that the time of the birth of the illegitimate child, in relation to the onset of his father's disability is as irrelevant for an illegitimate child's need for support as for that of a legitimate child.

Section 216(h)(3) of the Social Security Act cannot pass the constitutional test mandated by this line of cases: the classification, here, of illegitimate children, is not reasonably related to the purpose of the Social Security Act, and is not justified by any appropriate governmental interest.

**B. Blanket Exclusion of the Entire Classification of After-Born Illegitimate Children for the Purpose of Preventing Fraud Is Not a Suitable Means of Furthering an Appropriate Governmental Interest.**

Despite the fact that the discrimination against illegitimate children does not further the primary governmental purpose of providing support to wage earners and their dependents, the Secretary of the Department of Health, Education and Welfare has contended that the discrimination against after-born illegitimate children created by the Act is not as arbitrary as it appears, that it is "reasonable" because it furthers a "governmental interest" in protecting the Social Security Trust Fund against spurious claims. He also claims that because children whose parents have never married each other would be less likely than other children to need replacement of lost support from their fathers, it is reasonable to distinguish such children within the Social Security Act. Thus, the Secretary implicitly concedes that the discrimination effected by section 216(h)(3) does not further the primary purpose of the Social Security Act, but contends that the discrimination suitably furthers a secondary but appropriate governmental interest, the saving of administrative time, effort, and money by the elimination of individualized screening of every applicant.

The District Court erroneously relied on the Secretary's contentions in upholding section 216(h)(3) (*Jimenez v. Richardson*, 353 F. Supp. 1356 (1973)). Its finding that the exclusion of after-born illegitimate children from eligibility for Social Security benefits is constitutionally permissible in order to prevent spurious claims is erroneous.

Just one year ago this Court specifically held that the spectre of fraud cannot excuse invidious discrimination against illegitimate children.

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Gomez v. Perez*, 409 U.S. 535 (1973).

The "impenetrable barrier" against after-born children could be removed from section 216(h)(3) without lightly brushing aside potential problems with respect to fraud. For purposes of Title II eligibility, legitimate children are presumed to be the children of their mother's husbands; illegitimate children must prove their paternity. The sections relating to illegitimate children describe the criteria by which paternity must be satisfactorily established. Thus, the requirements of written acknowledgement, court orders, or other reasonable proof satisfactory to the Secretary are themselves designed to prevent and are effective in preventing fraudulent claims. To require proof of paternity for illegitimate children is not unreasonable, and is not challenged here. However, the requirement that in order to be permitted to have the opportunity to offer proof of paternity an illegitimate child must have been born and have met the other requirements before the event that established his father's eligibility for Social Security benefits is arbitrary and irrational. The rule's sweep is so broad, barring all after-born illegitimate children, that it bears no reasonable relation to screening for fraud. The credibility of relevant proof of a child's paternity is not affected by his date of birth. It is reasonable to demand proof of this

relationship, but unreasonable to refuse to even consider proof—that might in fact be perfectly acceptable—simply because the child-applicant was born after the onset of his father's "old-age" or disability. The denial of any opportunity to present relevant proof is not an administrative mechanism rationally related to the purpose of preventing fraud.

As the dissenting judge in the District Court in this case stated:

> Significantly, the Court was not unmindful in these cases [*Weber, Richardson v. Davis, Richardson v. Griffin*] that children born out of wedlock presented difficult problems of proof as to actual dependency. In *Weber*, the Court indicated that they would respect a state's method of determining the genuineness of individual claims. However, the Court made it clear that once dependency was established, the Constitution required that all dependents—whether legitimate or illegitimate—must be treated equally. 406 U.S. at 175.
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> * * * * *
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> While I would agree that the need to guard against fraudulent claims is surely a valid legislative goal, I cannot agree that a total exclusion of a class of claims—some of which will be demonstrably valid—is a reasonable means of achieving that goal. 353 F. Supp. 1356, 1362 (1973).

The irrationality and the superfluousness of the "before-born" requirement of section 216(h)(3) is most easily apparent from a consideration of the Social Security Act itself. Under section 216(h)(3)(C), an illegitimate child may offer proof of his paternity and qualify for survivor's benefits if he was acknowledged before his father's death. In other words, a child who is conclusively presumed ineligible for benefits while his

father is alive may receive survivor's benefits when his father dies. Thus Ramon Jimenez's acknowledgement of Eugenio and Alicia does not avail them now, but would after his death. Surely the evidence of paternity or support, identical under the statute for both disability and survivors' benefits, does not gain in probative value simply because the father dies.

Similarly, Eugenio and Alicia would currently be eligible if they lived in a State that allowed them to inherit in intestacy under Section 216(h)(2)(A), because they would be permitted to offer proof that they were being supported by their fathers at the time applications were filed on their behalf. The Secretary has never offered proof that he has been unable to avoid widespread, or even occasional fraud, in those jurisdictions that allow illegitimate children to inherit from their fathers,[18] even though in these jurisdictions—twenty-four in number—illegitimate children born or acknowledged after their wage earner fathers became disabled or "aged" need not have been born before the event that established their parent's eligibility, and such children are constantly found eligible for child's insurance benefits.[19] Presum-

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[18]The District Court opinion seems to imply that the Secretary did offer such proof in letters submitted to the Court after oral argument. In fact, however, these letters (filed with the district court November 6, 1972) contained only *hypothetical* examples of situations in which a wage earner could obtain an increase in the total benefits paid on his account by falsely acknowledging a child not his own. There is no suggestion of a single instance in which such fraud actually occurred.

[19]Twenty-four states allow illegitimate children to inherit from their fathers; twenty-three are listed in *Labine v. Vincent*, 401 U.S. 532, 557 (1971), and see Maryland Code Ann., Art. 93, Sec. 1-208.

ably, problems of fraud identical to those under section 216(h)(3) are posed in those jurisdictions that allow illegitimate children to inherit. If the Social Security Administration is capable of detecting and preventing fraud in these jurisdictions, it should also be capable of doing so in other jurisdictions. The fact that it has not adduced examples of actual fraud where it is presently possible for after-born illegitimate children to receive benefits suggests that, as in *Mayers v. Ridley*, "the parade of horribles to which appellees point is largely imaginary." 465 F.2d 630, 641 (D.D.C. 1972).

The case of *U.S. Department of Agriculture v. Moreno*, ___ U.S. ___, 37 L.Ed.2d 782 (1973), provides a useful analogy for the purposes of evaluating the Secretary's justification of the discrimination against after-born illegitimate children. In *Moreno*, a section of the Food Stamp Act (§3(e) of 7 U.S.C. §2012(e)) declared ineligible any household whose members were not all related. The plaintiffs claimed that the section violated the constitutional guarantee of due process by classifying households arbitrarily along lines that had no rational relationship to the purpose of the Act. The Government defended the section, as does the Secretary here, on the ground that it lessened administrative burdens and prevented fraud. The Court found no rational relation between the fact of unrelated household members and the purpose of the Act. Left, as in the instant case, with no other justification for the section, the Government maintained (___ U.S. ___, 37 L.Ed.2d 782, 788)

> that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program. In essence, the Government contends that in adopting

the 1971 amendment (section 3), Congress might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are relatively unstable, thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

At the outset, it is important to note that the Food Stamp Act itself contains provisions wholly independent of §3(e), aimed specifically at the problems of fraud and of the voluntarily poor. For example, with certain exceptions, §5(c) of the Act [citations omitted], renders ineligible for assistance any household containing "an able-bodied adult person between the ages of eighteen and sixty-five" who fails to register for, and accept, offered employment. Similarly, §14(b) and (c) [citations omitted], specifically impose strict criminal penalties upon any individual who obtains or uses food stamps fraudulently. The existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses. See *Eisenstadt v. Baird*, 405 U.S. 438, 452, 31 L.Ed.2d 439, 92 S.Ct. 1029 (1972); cf. *Dunn v. Blumstein*, 405 U.S. 330, 353-354, 31 L.Ed.2d 274, 92 S.Ct. 995 (1972)

Extensive quotation from *Moreno* is appropriate because the analogy to the present case is so pointed. In *Moreno*, as here, the Government contended that members of the disputed class are less "likely" to be eligible to receive benefits, and that the exclusion of the group as a whole would prevent fraudulent applications. And in *Moreno*, the government's factual assumptions, like the assumption about the likelihood of past support in this case (discussed below), was "wholly unsubstantiated." Moreover, here as in *Moreno*, even if the government's factual assumptions were true, they would not provide a constitutionally acceptable basis for exclusion of "all otherwise eligible" applicants. And in both cases there exist other statutory means of preventing fraud, which, as this Court recognized, "casts considerable doubt upon the proposition" that the section in question "could rationally have been intended to prevent those very same abuses." *Moreno* at 405 U.S. 330, 354. The Social Security Act contains provisions, exactly analogous to those referred to in *Moreno*, to prevent fraud. Section 216(h)(3) itself, by definition, excludes those children who do not have the right to support from their fathers. The Social Security Administration has, and exercises, the authority to require reasonable individualized proof of all claims for benefits. Each claim is in fact reviewed on the basis of individual merit. 42 U.S.C. §405; 20 C.F.R. §404.722; *Social Security Handbook*, SSI-135, 1969, §170ff; Social Security Administration Claims Manual, §2431ff. In addition, just as in the Food Stamp situation, the Administration may subject a wrongful claimant to prosecution for a misdemeanor, pursuant to 42 U.S.C. §408, and may recoup all benefits wrongfully paid, 42 U.S.C. §404.

The Secretary's claim that the exclusion of after-born illegitimate children prevents fraud is an attempt to

justify an unconstitutional irrebuttable presumption: that all illegitimate child-applicants who are born after the onset of their alleged father's disability or old-age are in fact not the children of the fathers on whose account they apply for benefits.

A legitimate child born after his father becomes disabled or "aged" is eligible for benefits. An illegitimate child born after his father becomes disabled or "aged" is not even given an opportunity to prove that he has been acknowledged or supported by his insured father, or that he has met any of the qualifications that would make him eligible. Even if the child, as Eugenio and Alicia Jimenez, has been acknowledged by the father in writing, been supported and nurtured by him, and is living with him, he cannot prove these things to the Social Security Administration and so become eligible for benefits. An after-born legitimate child is conclusively presumed to be eligible. An after-born illegitimate child is irrebuttably presumed to be ineligible.

There is no relationship between the known fact: birth after the onset of disability or "old-age" and the presumed fact: the fraudulent nature of the claim. The presumption is therefore constitutionally invalid, because to meet due process standards, some significant nexus must exist between the two "facts." See, *United States v. Romano*, 382 U.S. 136 (1965); *Heiner v. Donnan*, 285 U.S. 213 (1932). This case is thus similar to *U.S. Dept. of Agriculture v. Murry*, ___ U.S. ___, 37 L.Ed.2d 767 (1973), in which this Court invalidated a section of the Food Stamp Act because it created an irrebuttable presumption linking a fact–tax dependency in a prior year–with another fact–need of the dependent for food stamps in the following year–when there was no real relation between the two. This Court struck the presumption down because such a linkage "rests on an irrebut-

table presumption often contrary to fact [and] therefore lacks critical ingredients of due process found wanting in *Vlandis v. Kline*, 410 U.S. ___ (1973); *Stanley v. Illinois, supra*; and *Bell v. Burson*, 402 U.S. 535." *U.S. Dept. of Ag. v. Murry*, ___ U.S. ___, 37 L.Ed.2d 767, 773 (1973).

The Social Security Administration, having other devices to prevent fraud, is simply attempting to avoid the marginal administrative cost and effort involved in individual screening of after-born illegitimate children by arbitrarily excluding the entire group. The exclusion is clearly not necessary to prevent spurious claims; it is merely a short cut to prevention of fraud.

The government may well have a legitimate interest in efficient administration, but this Court has repeatedly ruled that efficiency alone cannot be decisive:

> . . . it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizen from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois*, 410 U.S. 645, 656.

And see *U.S. Department of Agriculture v. Murry*, ___ U.S. ___, 37 L.Ed.2d 767 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The promotion of efficiency is

not an "appropriate" governmental interest, if it subverts the primary governmental interest expressed by an act as a whole. The section in question here and the attempted justification of it must be studied in their effect on the purpose of Title II of the Social Security Act.

Classifications made within the Social Security Act, for the purpose of increasing efficiency, can be acceptable only if they do not interfere with the primary goal of the Act, the provision of support to wage earners and their dependents in time of old age, sickness, or death. A classification could be "appropriate" even if it did not itself further the primary goal of the legislation, as long as it did not defeat that main purpose, and if it promoted some appropriate secondary purpose in a "suitable" manner. The classification here complained of does in fact interfere with the primary purpose of the Social Security Act, as it deprives some otherwise eligible children of Social Security benefits. The speculative possibility that many applicants would be found ineligible does not justify the "blunderbuss" exclusion of all the possible applicants. *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969). "... [T]he means the State employs must be precisely drawn in light of the acknowledged purpose." *Sugarman v. Dougall*, ___ U.S. ___, 37 L.Ed.2d 853 (1973).

### C. The Relative Likelihood of Support for All Illegitimate Children Is Irrelevant Because the Statutory Scheme Requires That Each Individual Applicant Prove His Eligibility and Because Actual Receipt of Support Is Not Determinative of Eligibility.

The classification of after-born illegitimate children is so irrational and indefensible in relation to the overall

purpose of the Social Security Act that the Secretary has never seriously attempted to justify it on any grounds except as a measure to prevent fraud, discussed above. The Secretary has, however, advanced an additional justification for the invidious discrimination against after-born illegitimate children. In this theory, which was, appropriately, passed over lightly by the District Court, the Secretary claims that the Social Security Act is meant to compensate children for loss of support from an aged, disabled, or deceased parent, that illegitimate children are less likely to have been supported, and so to have suffered a loss when their parent ceased working, and that therefore the classification is reasonably related to the purposes of the Social Security Act.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court was faced with a similar argument in relation to the Louisiana Workmen's Compensation laws, which denied benefits to dependent unacknowledged illegitimate children. The State there contended that the exclusion of unacknowledged illegitimate children was reasonable because such children as a group were less likely to have been living with or supported by their fathers. The Court rejected this theory on the grounds that it was not compelling in a statutory scheme in which each individual must prove dependency on the deceased as a prerequisite to recovery. The Court's logic is directly applicable in the instant case. The likelihood of support for all illegitimate children as a group cannot be compelling in the context of the Social Security Act in which each individual applicant must prove that he or she meets the specific eligibility requirements as a prerequisite to receiving benefits. Indeed the likelihood of support is even less relevant here than it was in *Weber* because actual dependency is not a prerequisite to establishing eligibility in all cases; eligibility is frequently

founded on the existence of a legal right to support. A legitimate child or an acknowledged illegitimate child, for example, need not prove dependency; they are deemed dependent by virtue of section 202(d).

The Secretary's argument is irrelevant and misleading for another reason. The Social Security Act does not require past experience of support any more than it requires present support. That it does not require present support in all cases is apprent from the fact that legitimate children are deemed to be supported, whether or not they ever actually receive money from their parents, under section 202(d). That the Act does not require *past* experience of support is shown by the eligibility of after-born legitimate children. After-born legitimate children can of course have no more experience of support from current earnings than can after-born illegitimate children. The Secretary's argument further crystallizes the pure discrimination between legitimate and illegitimate children. Once again the Secretary has not advanced a reasonable justification, but rather has tried to defend a discriminatory irrebuttable presumption which only masks concern for administrative efficiency.

## III.

## THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN WORKED BY SECTION 216(h)(3) MUST BE IN FURTHERANCE OF A COMPELLING GOVERNMENTAL INTEREST IN ORDER TO BE CONSTITUTIONALLY ACCEPTABLE.

Judged by the most lenient of equal protection standards, the discrimination against after-born illegitimate children effected by Section 216(h)(3) is unconstitutional. The Court is not, however, limited to

this most lenient standard. Illegitimacy is properly a suspect classification and discrimination against illegitimates can be justified only by a compelling governmental interest.

### A. Illegitimacy Is a Suspect Classification.

Illegitimacy should be explicitly recognized as a "suspect classification,"[20] for it shares all of the relevant characteristics that have been the bases for the Court's designations of other classifications as "suspect." Recently, four members of this Court, in expressing the view that classifications based on sex are suspect, *Frontiero v. Richardson*, 411 U.S. 677 (1973), described certain criteria particular to suspect classes. Illegitimacy has the characteristics so described. Illegitimacy, like sex, "like race and national origin, is an immutable characteristic determined solely by the accident of birth, [therefore] the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized

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[20]The lack of a clear equal protection standard to be applied to illegitimacy has caused considerable confusion among lower courts, which would be eliminated by a clarification of this Court's position. Compare, *Miller v. Laird*, 349 F. Supp. 1034, 1039-43 (D.D.C. 1972); *Jimenez v. Richardson*, 353 F. Supp. 1356 (D. Ill. 1972); *Severance v. Weinberger*, 362 F. Supp. 1348 (D.D.C. 1973); *Weinberger v. Beaty*, 478 F.2d 300 (1973).

suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The reliance on *Weber*, an illegitimacy case, is logical and appropriate. Illegitimacy, like race, national origin and sex is an unalterable condition, a condition over which the children so labeled have no control, a condition they are powerless to change; a condition bearing no relation to ability to perform or to contribute to society; a condition bearing no relationship to individual responsibility.

This Court has recognized, in many cases dealing with classifications based on race and national origin, that to base distinctions between people on the basis of conditions of birth or ancestry is constitutionally suspect. See, e.g., *McLaughlin v. Florida*, 379 U.S. 185 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944); *Oyama v. California*, 332 U.S. 633 (1945). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1942).

The stigma associated with racial classifications has been a major factor in the Court's treatment of race as a suspect class. Illegitimacy shares with race the fact that designation by these classifications subjects a child to "a stigma of inferiority and a badge of opprobrium."[21]

This Court has already clearly recognized that illegitimate children share this experience of social humiliation with other suspect classes, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972):

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[21] "Development in the Law of Equal Protection," 82 Harv. L. Rev., 1065 (1969).

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the *social opprobrium suffered by these hapless children*, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth[14] where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. 164, 175-176.[22]

The sociological and psychological literature more than supports the Court's understanding of the opprobrium suffered by illegitimate children. See, for example, H. Krause, *Legitimacy: Law and Social Policy* (1971); Foder, "Emotional Trauma Resulting From Illegitmate Birth," 54 *Archives of Neurology and Psychiatry* 381 (1945); "Illegitimacy," Vol. 7, *Encyclopedia of the Social Sciences*, 579 (1935). The likelihood that any classification on the basis of illegitimacy will subject a child so classified to such opprobrium, ridicule and

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[22]Emphasis added. Footnote 13 is omitted. Footnote 14 states: "See *Graham v. Richardson*, 403 U.S. 365 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Brown v. Board of Education*, 347 U.S. 483 (1954); and see also *Hirabayashi v. United States*, 320 U.S. 81 (1943)." All of the cases referred to concern suspect classifications.

condemnation, is great enough to establish differential treatment of illegitimacy as suspect.

Moreover, illegitimate children are a "discrete and insular minority," needing special protection by the courts. See Mr. Justice Stone's footnote to *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153, n.4 (1938). Nine and seven-tenths per cent of all live births in 1968 in the United States were illegitimate[23] but these children do not wield the influence that their numbers warrant (a criterion suggested by Justice Stone), and so are subject too easily to statutory discrimination. Illegitimate children, as a group, bear "the traditional indicia of suspectness" described by the Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). They are

> . . . saddled with such disabilities, or subject to such a history of purposeful inequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection . . .

This Court seems to have implicitly recognized, in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), that illegitimacy is a suspect class, as is illustrated by the passage quoted above, at p. 41. Indeed, at least some members of the Court believe that the classification of illegitimacy has already been recognized, at least in certain contexts, to be suspect. See, Mr. Justice Stewart, concurring, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 60, and Justices Douglas and Marshall, dissenting, at p. 108. See also, *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973).

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[23]Statistical Abstracts of the United States, 1973, 94th Annual Edition, U.S. Dept. of Commerce.

Illegitimacy should thus be treated explicitly in this case as a suspect class, as it shares all the crucial criteria with race and national origin.

### B. The Discrimination Against After-Born Illegitimate Children Is Not Justified by Any Compelling Governmental Interest, and so Must Be Found Unconstitutional.

Because the classification of the illegitimacy is properly suspect, statutes discriminating against illegitimates must be subject to strict judicial scrutiny, and may be found constitutionally sound only if the classification is necessary for the promotion of a compelling state interest. *Oyama v. California*, 332 U.S. 633 (1948); *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

The classification of children according to their illegitimate status in the Social Security Act is not even rationally related to the purpose of that Act, as was discussed in Section II-B, *supra*. The discrimination is not necessary to the advancement of any constitutionally legitimate governmental purpose, much less a compelling purpose.

As appellants have shown, the primary justification suggested by the Secretary for the discrimination worked by Section 216(h)(3) is that it prevents spurious claims. One test of whether a statutory classification is necessary to the achievement of a compelling state interest is whether it is "tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goals." *Kramer v. Union Free School District*, 395 U.S. 621, 632. Here, the *articulated* goal is the prevention of spurious claims. Quite obviously, the total exclusion of plaintiffs and their class is not

*necessary* to prevent spurious claims: Fraudulent claims can be weeded out by the Secretary's regular examination of each individual applicant. Individual screening may well involve some additional administrative effort, but the saving of administrative effort, legitimate though it may be, is not a "compelling" governmental interest. In *Oyama v. California*, this Court stated that "only the most exceptional circumstances can excuse discrimination" on the basis of racial descent. 332 U.S. 633, 646. The desirability of administrative efficiency is universal: it would always be preferable to administer government efficiently. But the need for efficiency is hardly an exceptional circumstance, so compelling as to justify this discrimination. As four justices of this Court recently stated:

> When we enter the realm of "strict judicial screening," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965).
>
> *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973).

## CONCLUSION

Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) violates the constitutional guarantee of equal protection of the law as it is embodied in the Due Process Clause of the Fifth Amendment.

For this reason, it is respectfully submitted that the judgment of the district court should be reversed and that court directed to order the Secretary of Health, Education and Welfare to cease enforcement of that portion of Section 216(h)(3) here challenged; to find Eugenio

and Alicia Jimenez eligible to receive child's insurance benefits; and to make restitution to them for Social Security benefits wrongfully denied from the date of their application. Further, it is submitted that the case should be remanded to the district court for consideration of proper relief with respect to restitution for members of the plaintiff class.

Respectfully submitted,

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Summary of argument | 6 |
| Argument | 8 |
| I. The historical background and development of the Social Security Act show that the provisions here involved were part of a Congressional plan to provide benefits generally only to those persons who were likely to have lost support as a result of a wage earner's disability | 8 |
| II. The limitation in 42 U.S.C. 416(h)(3)(B) that Social Security disability benefits will be paid only to those illegitimate children who meet the conditions there specified has a rational basis because it furthers the permissible Congressional objective of providing benefits only to categories of persons likely to have lost support as a result of the disability of a wage earner | 13 |
| III. The validity of the provisions of the Social Security Act here challenged depends upon whether they are rationally based and not upon whether they serve a compelling state interest | 24 |
| Conclusion | 28 |
| Appendix A | 1a |
| Appendix B | 5a |




533-480—74——1

CITATIONS

Cases:


| | Page |
|---|---|
| *Beaty* v. *Weinberger*, 478 F. 2d 300 | 17, 26 |
| *Carrington* v. *Rash*, 380 U.S. 89 | 22 |
| *Dandridge* v. *Williams*, 397 U.S. 471 | 23, 24, 25 |
| *Davis* v. *Richardson*, 409 U.S. 1069, affirming, 342 F. Supp. 588 | 23, 25 |
| *Flemming* v. *Nestor*, 363 U.S. 603 | 18 |
| *Frontiero* v. *Richardson*, 411 U.S. 677 | 27 |
| *Glona* v. *American Guarantee Co.*, 391 U.S. 73 | 27 |
| *Gomez* v. *Perez*, 409 U.S. 535 | 4, 23, 24, 27 |
| *Griffin* v. *Richardson*, 409 U.S. 1069, affirming 346 F. Supp. 1226 | 23 |
| *Hagler* v. *Finch*, 451 F. 2d 45, certiorari denied, 405 U.S. 1071 | 20 |
| *Jefferson* v. *Hackney*, 406 U.S. 535 | 23 |
| *Labine* v. *Vincent*, 401 U.S. 532 | 7, 27 |
| *Levy* v. *Louisiana*, 391 U.S. 68 | 27 |
| *Morris* v. *Richardson*, 455 F. 2d 775, certiorari dismissed a improvidently granted, 410 U.S. 422 | 20 |
| *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 | 27 |
| *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686 | 23 |
| *Norton* v. *Weinberger*, 364 F. Supp. 1117 | 13, 15, 17, 26, 27 |
| *Parker* v. *Secretary of Health, Education and Welfare*, 453 F. 2d 850 | 15 |
| *Perry* v. *Richardson*, 440 F. 2d 677 | 15 |
| *Richardson* v. *Belcher*, 404 U.S. 78 | 7, 24, 25 |
| *Richardson* v. *Perales*, 402 U.S. 389 | 21 |
| *Severance* v. *Weinberger*, 362 F. Supp. 1348 | 26 |
| *Shapiro* v. *Thompson*, 394 U.S. 618 | 25 |

Cases—Continued


| | Page |
|---|---|
| *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 | 21 |
| *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 | 18 |
| *Watts* v. *Veneman*, 476 F. 2d 529 | 15, 25 |
| *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 | 21, 27 |
| *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 | 22 |
| *Statutes:* | |
| Social Security Act 49 Stat. 620, as amended, 42 U.S.C. 301, *et seq:* | |
| 42 U.S.C. 402(d) | 2, 26, 1a |
| 42 U.S.C. 402(d)(3) | 14, 26, 27 |
| 42 U.S.C. 402(d)(8)(C) | 27 |
| 42 U.S.C. 402(d)(8)(E) | 20 |
| 42 U.S.C. (1970 ed., Supp. II) 402(d)(8)(D) | 20 |
| 42 U.S.C. 415 | 14 |
| 42 U.S.C. 416 | 2a |
| 42 U.S.C. 416(c)(5) | 11 |
| 42 U.S.C. 416(e) | 27, 2a |
| 42 U.S.C. 416(h) | 26 |
| 42 U.S.C. 416(h)(2) | 2, 14, 26, 27, 28, 2a |
| 42 U.S.C. 416(h) (1958 ed.) | 11 |
| 42 U.S.C. 416(h)(3) | 2, 3, 4, 5, 13, 14, 17 |
| 42 U.S.C. 416(k) | 11 |
| Social Security Amendments of 1960, Pub. L. 86–778, § 201(b), 74 Stat. 946 | 20 |
| Social Security Amendment of 1967, Pub. L. 90–248, § 112(a), 81 Stat. 838–839 | 20 |
| Social Security Amendments of 1972, P.L. 92–603, § 111(a), 86 Stat. 1346–1347 | 27 |
| Social Security Amendments of 1972, P.L. 93–66, § 240(a); 87 Stat. 161 | 21 |

Miscellaneous:


| | Page |
|---|---|
| H. Rep. No. 728, 76th Cong., 1st Sess. | 9 |
| H. Rep. No. 2526, 79th Cong., 2d Sess. | 11 |
| Krause, *Illegitimacy; Law and Social Policy*, (1971) | 27 |
| Rule 23(c)(1), Fed.R.Civ.P. | 4 |
| S. Rep. No. 404, 89th Cong., 1st Sess. | 13, 22 |
| S. Rep. No. 92-1230, 92d Cong., 2d Sess. | 20 |
| Social Security Administration Claims Manual | 50 |
| Section 2411 | 11a |
| Section 2420.6 | 6a |
| Section 2421 | 26 |
| Section 2424.5 | 5a |
| Section 2424.6 | 5a |
| Section 2424.7 | 5a |
| Section 2654 | 5a, 11a |
| Section T4510(d)(2) | 10a, 11a, 12a |
| Section 4529(d)(2) | 7a |

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-6609

EUGENIO AND ALICIA JIMENEZ, BY THEIR FATHER AND NEXT FRIEND RAMON JIMENEZ, APPELLANTS

*v.*

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

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## BRIEF FOR THE APPELLEE

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### OPINION BELOW

The opinion of the three-judge district court is reported at 353 F. Supp. 1356.

### JURISDICTION

The judgment of the three-judge district court was entered on January 30, 1973. A notice of appeal to this Court was filed on February 22, 1973. The jurisdictional statement was filed on April 23, 1973, and probable jurisdiction was noted on December 3, 1973.

The jurisdiction of this Court rests on 28 U.S.C. 1253.

## QUESTION PRESENTED

Whether Congress may constitutionally provide that an illegitimate child who cannot qualify for benefits under any other provision of the Social Security Act may obtain benefits only if the disabled wage earner father contributed to the child's support or lived with him prior to his disability.

## STATUTES INVOLVED

The relevant portions of Section 202(d) and 216(h)(3)(B) of the Social Security Act, 42 U.S.C. 402(d) and 416(h)(3)(B), are set out in Appendix A, pp. 1A–4A, *infra*.

## STATEMENT

This case involves the constitutionality of a provision of the Social Security Act which specifies the circumstances under which children may receive benefits on the Social Security account of a wage earner. Legitimate or legitimated children, illegitimate children who can inherit their parent's property under the intestacy laws of the state of his domicile and show dependency at the time of filing an application, and those who cannot inherit only because their parents' ceremonial marriage was invalid for non-obvious defects, are entitled to receive benefits without any further showing (42 U.S.C. 402(d)(3), 416(h)(2)). In 1965, the Act was amended to allow benefit payments to illegitimate children who do not satisfy these requirements if, prior to the time the wage earner be-

came disabled, reached age 65 or died, he (1) acknowledged his paternity of the child in writing, (2) was determined in a court decree to be the father of the child, (3) was ordered by a court to contribute to the child's support because he was the father, or (4) was living with the child or was contributing to the child's support (42 U.S.C. 416(h)(3)).

Ramon Jimenez, a covered wage earner under the Social Security Act, became disabled in April 1963, and became entitled to disability benefits in October 1963. Prior to that time he left his wife and five children and began living with Elizabeth Hernandez. Three children were born of that relationship, but Jimenez has not attempted to marry Hernandez and thus legitimate the children.[1] Jimenez resides in Illinois, a state which does not allow a non-legitimated illegitimate child to inherit from his father.[2] Thus, when Jimenez applied for children's benefits on behalf of those three children, the Secretary granted benefits to Magdalena, who was *in utero* at the time of Jimenez's entitlement to benefits, but ruled that the two other children, Eugenio and Alicia, did not qualify for benefits under 42 U.S.C. 416(h)(3)(B) because they were born after their father became entitled to disability insurance benefits (App. 9).

Appellants brought this action for review of the Secretary's final decision.[3] A three-judge district court

[1] Ill. Ann. Stat. Ch. 3, Sec. 12.

[2] *Ibid.*

[3] Count II, paragraph 3, of the complaint describes this suit as a class action on behalf of "all claimants for child's social security insurance benefits, who are born out of wedlock after their fathers have become entitled to receive Social Security

was convened to consider appellants' contention that 42 U.S.C. 416(h)(3)(B) unconstitutionally discriminates against Jimenez's children who were born after he became disabled.

Upon cross motions for summary judgment, the court, with one judge dissenting, upheld the Secretary's denial of benefits to Alicia and Eugenio and sustained the validity of 42 U.S.C. 416(h)(3)(B) (App. 22–29). The court held that the insurance benefits claimed were not a "fundamental right," and that the "rational basis" rather than the "compelling state interest" test is the proper standard by which to determine the constitutionality of legislative classifications based upon legal status at birth. The court distinguished *Gomez* v. *Perez*, 409 U.S. 535, which had invalidated a statute excluding *all* illegitimate children from the statutory right to support afforded legitimate children, on the ground that the exclusion involved in the present case applies "only to a well-defined category of [illegitimates] * * * suggesting that factors other than illegitimacy might account for the discrimination here." 353 F. Supp. at 1360 (App. 27).

Applying the rational basis test, the court held that the classification here is rationally related to the legitimate governmental interest in avoiding spurious claims. The court reasoned (353 F. Supp. at 1361) (App. 28):

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insurance benefits by reason of old age, disability, or death" (App. 16). The district court did not certify the case as a class action in accordance with Rule 23(c)(1), Fed. R. Civ. P.

> [T]he requirement that § 416(h)(3)(B) children be born before the onset of their parent's disability is based upon the very simple, self-evident assumption that a person with nothing to gain from a spurious acknowledgement of paternity is not as likely to do so as one who could thereby increase his monthly income by one-half.

The court rejected appellants' contention that the legislative purpose of excluding spurious claims should be achieved by "less [drastic] means," noting that such means are not constitutionally mandated "under traditional notion of equal protection" (App. 28). Finally, the court doubted the efficacy of "more restrictive regulations and internal administrat[ion]," suggested by appellants as less drastic means for achieving the legislative goal of avoiding spurious claims, stating (*ibid*):

> Surely the parties to the collusion, who are in pari delicto, have little incentive to come forward and confess the error of their ways. And it would truly be the exceptional father who, having sired a child out of wedlock, would subsequently come forward, acknowledge his real paternity, and seek to have his child removed from the rolls of public welfare.

Accordingly, the district court held that the classification in 42 U.S.C. 416(h)(3)(B) was rationally based, and dismissed the suit. 353 F. Supp. at 1362; App. 27–28.

533-480—74——2

## SUMMARY OF ARGUMENT

### I

The Social Security program has historically been designed to replace support lost by a wage earner or those dependent on him as a result of his death, disability or old age. In furtherance of this goal, Congress has reasonably established criteria to delineate classes of persons who are more likely to have lost support as a result of disability. Congress has also imposed various requirements designed to prevent manipulation of events solely for the purpose of obtaining benefits.

### II

In the present case Congress has provided that a child who cannot inherit his father's estate under state intestacy laws may not obtain social security benefits unless the father took one of a number of qualifying actions prior to his disability. This provision is rationally related to the purposes of the Act. Children not in being at the time of the father's disability cannot have lost any existing support as a result of such disability. Moreover, since children's benefits under the Social Security Act were instituted as a substitute for lump sum death benefits, it is also rational to relate such benefits to provisions of state intestacy laws.

Congress could also have reasonably concluded that after becoming disabled, men who were not fathers might be more likely to acknowledge paternity and thus increase their benefits without cost. As this Court

noted in *Richardson* v. *Belcher*, 404 U.S. 78, 84 "[w]e have no occasion * * * to judge for ourselves whether the apprehensions of Congress were justified by the facts."

Congress may legislate in a social welfare area such as this by dealing with only one aspect of a problem, or by advancing one step at a time toward a solution. Congress may also consider problems of administration in determining how to deal with the problem. Congress has here reasonably made the judgment that consideration of a number of factors justifies refusing to extend benefits to the narrow category of illegitimates involved in this case.

## III

Illegitimacy has not been, and should not be, viewed as a "suspect category" so that a law creating separate categories for illegitimate children requires a "compelling state interest" rather than a "rational basis" to sustain it. Illegitimacy is not a visible condition, the status of children as illegitimate can be changed, and illegitimacy is a relevant factor in determining the disposition of estates at death. *Labine* v. *Vincent*, 401 U.S. 532. Since the instant case involves benefits which were provided as a substitute for death payments and involves judgments as to the consequences of various familial relationships, Congress had a rational basis for concluding that illegitimacy should be considered in evaluating the likelihood that a particular class of children lost support as a result of the disability of a wage earner.

## ARGUMENT

### I

### THE HISTORICAL BACKGROUND AND DEVELOPMENT OF THE SOCIAL SECURITY ACT SHOW THAT THE PROVISIONS HERE INVOLVED WERE PART OF A CONGRESSIONAL PLAN TO PROVIDE BENEFITS GENERALLY ONLY TO THOSE PERSONS WHO WERE LIKELY TO HAVE LOST SUPPORT AS A RESULT OF A WAGE EARNER'S DISABILITY

Since its inception, the Social Security Act has been designed primarily to provide substitute support to those who have lost support through the inability of a wage earner to continue earning. The Act has also continuously contained provisions to simplify problems of proof and prevent spurious claims. In addition, it has contained provisions to eliminate claims which, while not fraudulent, have led to and have arisen out of the manipulation of events to create eligibility. These provisions have affected the full range of beneficiaries under the Act and have not been limited to illegitimate children or children generally. To demonstrate these principles, we now provide a brief history of such provisions.

The original Social Security Act, 49 Stat. 620, provided only retirement benefits for the wage earner himself. There was accordingly no need for provisions guarding against persons improperly becoming beneficiaries under the Act. On the death of the wage earner, a lump sum was paid to his estate. *Id.* Sec. 203(a).

In 1939, however, the Act was changed to provide benefits (1) to the spouse and children of a retired

wage earner and (2) to the children and widow or widower of a deceased wage earner in place of the lump sum death payment. See H. Rep. No. 728, 76th Cong., 1st Sess., p. 7. At that point problems of definition and coverage arose. Who is a "wife"? Who is a "child"? Should benefits be paid to a woman who marries a retired wage earner on his deathbed?

As a first answer, Congress provided that definitions of familial relation should follow state intestacy laws relating to children, parents and spouses. 53 Stat. 1378, Sec. 209(m). Thus, the well-developed state laws of domestic relations would be used to determine the effect of common law marriages, and to define the rights of step-children and other relations, as well as the status of illegitimate children.

Since survivor's and dependent's benefits were originally conceived as a substitute for a payment to the wage earner's estate, a rule which determined eligibility under state intestacy laws was rationally based.

In addition, Congress took other steps to insure that benefits were paid only to those who were likely to have lost support as a result of the wage earner's retirement or death, and to prevent the manipulation of the system. Section 209(i) required that a woman, in order to receive wife's benefits, must have married the wage earner before 1939, when these benefits were provided, or before he reached the age of 60. If, however, she had borne the wage earner a child at any time, that entitled her to benefits, since that fact itself constituted the necessary indicia of likelihood of having had support. 53 Stat. 1377. Similarly, widows were

not entitled to benefits unless they had been married to the wage earner for a year before his death unless they had borne him a child. *Id.*, Section 209(j). Section 209(k) provided that children of women covered under the two preceding sections could receive benefits only if their mothers could.

Congress in the 1939 Amendments also indicated its intention to limit benefits to persons likely to have lost support as a result of the wage earner's disability. It provided that although legitimate children were ordinarily deemed dependent on their parents and thus eligible for benefits, they would not be so deemed where they had actually been adopted by another person. 53 Stat. 1364, Sec. 202(c)(3)(B). Finally, the payment of lump sums to the deceased's estate, already largely changed to a program of survivor's payments, was amended to provide that if there were no person eligible for survivor's payment, the money would go to specified relatives, rather than to the estate. *Id.* at 1366–1367, Sec. 202(g). This change also seemingly reflected the view that benefits should depend upon loss of support.

Since 1939, Congress has made numerous changes in these requirements, reflecting experience in their operation and effect. In making these changes Congress has been sensitive to avoiding the provision of benefits to persons in situations which would permit the creation and manipulation of family relationships primarily to qualify for benefits. Thus, in 1946 the requirement for wife's benefits that the marriage take place before the wage earner reached age 60 was changed to a requirement that the couple must have

been married for three years before benefits could be paid. The House Committee report noted (H. Rep. No. 2526, 79th Cong., 2d Sess. at 25):

> The original provision was intended to prevent exploitation of the fund by claims for benefits from persons who married beneficiaries solely to get wife's benefits.

The Committee concluded, however, that a three-year waiting period would sufficiently serve this purpose, since it doubted that many persons would marry for monetary benefits if they had to wait three years for them.[4] The one-year period of marriage necessary for widows to qualify for benefits has been reduced to nine months, and additional ameliorative provisions have been added. See 42 U.S.C. 416(c)(5), 416(k).[5]

When benefits for dependents of disabled persons were added to the Act in 1958, Congress retained the conceptual framework it had established for death and retirement, under which relationships had to have existed for a certain time before disability. Thus, spouses were required to have been married for a specified period of time before a dependent's disability benefit would be paid, just as in the case of retirement. 72 Stat. 1021–1023. The same provisions for establishment of relationships by reference to state law were retained. 42 U.S.C. 416(h)(1958 ed.).

In 1965, when Congress extended benefits to certain illegitimate children who would not otherwise have

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[4] The changed provision is found at 60 Stat. 988. The period was later reduced to one year. 74 Stat. 950.

[5] This provision is being challenged in *Salfi* v. *Weinberger*, C-73-1863-ACW (N.D. Cal.), filed October 19, 1973.

qualified, it established objective criteria of eligibility which would usually indicate a substantial likelihood that the child had lost support due to the disability of the parent, and which would also indicate that the relationship had been created for reasons not solely related to the acquisition of benefits. See Point II, *infra*.

In sum, the history of the Social Security Act shows that the eligibility standards here involved did not arise from a sudden desire to penalize illegitimates. Rather, the present standards reflect the nature of the Social Security Act as an insurance-based rather than a need-based system; the desire to prevent the possible manipulation of the system; the long-standing deference to state intestacy laws in defining familial relations; and the Act's purpose of providing benefits to those who are most likely to have lost support from the death or disability of the wage earner.

Just as in many other portions of the Social Security Act, these standards may result in the denial of benefits to persons who appear to have ties of affection and need fully as strong as those of persons who receive benefits. Thus, benefits are provided to wives, but not to mothers of illegitimate children. But unless administrators are to be required to perform the impossible task of measuring such affection, objective criteria must be used. So long as the criteria have a reasonable relationship to the end sought to be served, they are constitutional. Moreover, if there is such a reasonable basis for the legislative action, it is irrelevant whether Congress in fact articulated

the basis for its decision. *Flemming* v. *Nestor*, 363 U.S. 603, 612.

## II

### THE LIMITATION IN 42 U.S.C. 416(H)(3)(B) THAT SOCIAL SECURITY DISABILITY BENEFITS WILL BE PAID ONLY TO THOSE ILLEGITIMATE CHILDREN WHO MEET THE CONDITIONS THERE SPECIFIED HAS A RATIONAL BASIS BECAUSE IT FURTHERS THE PERMISSIBLE CONGRESSIONAL OBJECTIVE OF PROVIDING BENEFITS ONLY TO CATEGORIES OF PERSONS LIKELY TO HAVE LOST SUPPORT AS A RESULT OF THE DISABILITY OF A WAGE EARNER

The liberalization of the Social Security Act in 1965 through the enactment of Section 216(h)(3), 42 U.S.C. 416(h)(3) (see *supra*, pp. 2–3), was intended to effectuate the long-standing legislative purpose "to replace the support lost by a child when his father retires, dies, or becomes disabled." S. Rep. No. 404, 89th Cong., 1st Sess., p. 110 (1965).[6] In adding that Sec-

[6] Appellants assume (Br. 28–38) that the Act's purpose is to provide benefits whenever the wage earner's paternity is established. However, as the court stated in *Norton* v. *Weinberger*, 364 F. Supp. 1117, 1127 (D. Md.): "The child's insurance benefits provision of the Social Security Act is founded on the dual concepts of parentage and dependency. To be eligible for benefits, a claimant must be both the child of and dependent upon the deceased wage earner. 42 U.S.C. § 402(d)(1)." (The court there upheld the constitutionality of 42 U.S.C. 416(h)(3)(C)(ii), which requires otherwise ineligible illegitimate children to show that they lived with or were supported by their wage earner father, prior to his death, in order to obtain benefits.)

With regard to the Act's purpose of replacing lost support, the disability and child's insurance benefits here at issue are not based upon the recipient's needs. The amount of benefits depends upon the wage earner's previous earnings; the more he earned prior to his disability, the higher the benefits pro-

tion, Congress extended benefits to illegitimate children who, although they probably had lost support by a wage earner's disability, were not then entitled to benefits.[7] As a result of the amendment, benefits were provided to illegitimate children where, prior to becoming disabled, the wage earner (1) had acknowledged them, in writing, to be his children, (2) had been decreed by a court to be the father, (3) had been required by a court to support them, or (4) was living with them or contributing to their support before he became disabled.[8] We submit that Congress had a rational basis for limiting benefits to those categories of illegitimate children and was not required further to provide benefits for all illegitimate children born after the wage earner became disabled.[9]

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vided. See 42 U.S.C. 415. The needs of the child do not affect the amount of benefits.

[7] In some states other than Illinois, an acknowledgment of paternity, or living with or contributing to the support of the child, or even public recognition of the child by the father, would enable the illegimate child to inherit under the state's intestacy laws, and thus make the child eligible for Social Security benefits under 42 U.S.C. 416(h)(2)(A), if the other requirements of 42 U.S.C. 402(d)(3) are met. See Appendix B, *infra*, and see discussion, *infra*, pp. 26–27 and note 14.

[8] The last two criteria ("living with" or "contributing") are relevant where the Secretary finds that the wage earner was the father of the child. See 42 U.S.C. 416(h)(3)(B)(ii).

[9] Appellants note (Br. 29–30) that children who do not qualify for dependents' benefits on the account of a disabled wage earner under 42 U.S.C. 416(h)(3)(B) may qualify for survivor's benefits under 42 U.S.C. 416(h)(3)(C) if the wage earner dies and argue that this is irrational. To the contrary, that result is consistent with the Act's purpose of avoiding manipulated claims, since Congress could reasonably conclude that such a claim could not be motivated by the deceased wage

These limitations are justified because children who meet these tests, or who have inheritance rights under state law, or whose parents underwent a formal marriage ceremony, are more likely to have lost support as a result of the disability of the wage earner than other children. For example, most children who can inherit, whether legitimate or illegitimate and whenever born, are likely to suffer some diminution of support at the death of the wage earner. As shown above, this was one of the reasons Congress shifted in 1939 from a lump-sum death benefit to continuing dependents' benefits. Since those who cannot inherit generally are unlikely to suffer the same loss of support on the death of the wage earner, Congress was justified in not providing benefits to those illegitimate children.

Other courts deciding analogous issues in Social Security cases have recognized the rationality of that Congressional conclusion and have upheld the provisions. *Watts* v. *Veneman*, 476 F. 2d 529 (C.A.D.C.); *Norton* v. *Weinberger*, *supra*, 364 F. Supp. at 1128; *Parker* v. *Secretary of Health, Education, and Welfare*, 453 F. 2d 850, 851–852 (C.A. 5); *Perry* v. *Richardson*, 440 F. 2d 677, 679 (C.A. 6). The court in *Watts*, *supra*, 476 F. 2d at 533, explained as follows (emphasis in original):

> Further, we see no problem with the incorporation of the District of Columbia intestacy laws into the Social Security laws for purposes of determining the eligibility for payments to illegitimates. In considering this incorporation,

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earner's desire to increase his Social Security benefits without concern for the child's welfare.

it is vital that one bear in mind the *purpose* in making Social Security payments to dependent minors and the *nature* of such payments.

The entire thrust of the Social Security laws relevant to dependents is to provide benefits to those who were most likely to have relied upon the deceased for their support. In light of this overriding purpose, it is well-established that Social Security benefits are not accrued property rights. One's ability to receive benefits is not dependent solely upon the biological relationship between the decedent and his children, but also upon the probability that the children were dependent for support upon the deceased.

Congress in enacting the Social Security laws made various judgments about the probability that children are dependent. For example, it seems more logical that illegitimates would be dependent upon their father if he has recognized them, or if in fact he is contributing to their support. The incorporation of a state's intestacy laws for purposes of determining eligibility is in furtherance of this scheme. If an illegitimate child may not inherit, then the child's support following the father's death is less likely to be dependent upon what was received upon the deceased's death than if the child could receive property following the wage earner's demise.

It must be remembered that the Social Security laws do not exclude all illegitimates from eligibility for payments. * * * Rather, the laws are reasonably designed to disqualify a class of illegitimates who are less likely, as a class, to possess the requisite biological or legal relation-

ship to or economic dependency on the wage earner.[10]

Congress certainly acted rationally in concluding that social security benefits should be primarily designed to compensate for the loss of support resulting from a wage earner's disability. As the House Committee Report on the original Social Security Act noted, it was vital to the success of the program that

[10] But see, *contra*, *Beaty* v. *Weinberger*, 478 F. 2d 300 (C.A. 5), pending on appeal to this Court, No. 73–521. Although the court there accepted the proposition that "illegitimate children are less likely to be supported by their fathers than h(2) children * * *" (*id.* at 306), it nevertheless held that the administrative burden of identifying false claims could not justify excluding from coverage those children who cannot qualify under any of the Act's other provisions for illegitimate children, and who are born after the wage earner became disabled and therefore, cannot qualify under 416(h)(3)(B) (*id.* at 308). As we have shown, however, the statute has a rational basis, and that should have been the end of the court's inquiry. Moreover, the decision raises serious practical problems in cases where the application on behalf of a post-disability child is filed as soon as the child is born. The court of appeals in *Beaty* did not invalidate the provision in 416(h)(3)(B) which requires the illegitimate to show that it was in fact dependent. Accord, *Norton* v. *Weinberger*, *supra*, 364 F. Supp. 1117 (D. Md.; three-judge court) pending on appeal to the Court, No. 73–5598. It simply required those children who were born after the wage earner's disability to prove dependency as of the time the application for benefits was filed (478 F. 2d at 306–307, 308). In *Beaty*, as in the present case, the application on behalf of the children was filed well after the wage earner became disabled, thus providing a period of time which the Secretary can examine to determine whether the child received support from the wage earner. In most cases, however, when the application for child's benefits would be filed immediately after birth, there would be no such time period to guide the Secretary in determining the child's dependency.

the public view it as providing benefits to which the recipients were entitled and not as charity. "The Social Security system may be accurately described as a form of social insurance * * * whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. * * * [I]ts specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on the Nation's resources which evolving economic and social conditions will of necessity in some degree modify" (*Flemming* v. *Nestor*, 363 U.S. 603, 609, 610). In formulating and amending the "highly complex and interrelated statutory structure" (*id.* at 610) which Congress found it necessary to adopt in order to provide an appropriate and functioning system of benefits, Congress did not abuse its broad discretion to formulate policy in this area when it concluded that the most appropriate touchstone for providing benefits was to replace the probable loss of support resulting from the disability of wage earners.[11]

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[11] Nor do these provisions constitute an invalid "irrebutable presumption" that appellants' claim is fraudulent or that the wage earner is not the father, as appellants contend (Br. 33–34). Rather, Congress has determined that, if the other qualifying conditions were not met (see *supra*, pp. 2–3, 14–15), the purposes of the Act would not be served by extending benefits to categories of persons who are unlikely to have lost support as a result of their father's disability.

*United States Department of Agriculture* v. *Murry*, 413 U.S. 508, relied on by appellants, is inapposite. The Food Stamp program is based on need, and the presumption there invalidated—the fact that a parent had taken a tax deduction for a

Congress' attempt to limit dependents' benefits to those illegitimate children who are likely to have lost support by a wage earner's disability may sometimes provide benefits to children who did not lose support. But this is no basis for invalidating the limitation, which in its overall operation reasonably implements a valid Congressional purpose to provide benefits to those categories of children upon whom a wage earner's disability is likely to have the most serious impact.

Although Congress has granted benefits to illegitimate children born after the wage earner's disability who would inherit from him under state intestacy laws, or whose parents underwent a formal, though legally defective marriage ceremony, Congress was justified in not extending benefits to other children born after the wage earner's disability. Congress was warranted in creating a statutory plan that would facilitate the exclusion of fabricated and manipulated claims. As the district court recognized (353 F. Supp. at 1361), the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. Any reliable test that might be devised to detect fabricated claims would necessarily entail substantial administrative burdens. Congress

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child as a dependent in a prior year established that the household in which the tax dependent was living the following year was not in need—had no rational basis. The Social Security Act is not based on need, however, and Congress could reasonably conclude that the classes differentiated here had different likelihoods of having lost support. Finally, as shown below (pp. 26–27) illegitimacy at birth is not a permanent bar to receipt of benefits.

reasonably declined to extend benefits to this additional group of children, who, as shown, could reasonably be deemed less likely to have lost support by a wage earner's disability.[12]

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[12] The statutory provisions for benefits for children adopted subsequent to a wage earner's disability involve similar considerations and reflect a similar solution. When the Social Security Amendments of 1960 extended benefits to after-adopted children, Congress attached safeguards designed to minimize the potential for abuse. It provided that benefits would be available only if the after-adopted child had been living with the wage earner before the onset of the disability (or if adoption proceedings had commenced by then) and if the adoption was decreed within two years after the disability entitlement. Social Security Amendments of 1960, Pub. L. 86–778, § 201(b), 74 Stat. 946. See *e.g.*, *Hagler* v. *Finch*, 451 F. 2d 45, 48 (C.A. 9), certiorari denied, 405 U.S. 1071. There was, at first, no exception to those requirements for children born after the wage earner became disabled. In 1967, Congress extended benefits to some after-adopted children who could not qualify under the 1960 law, but only to children whose adoption was effected by an elaborate two-step procedure which it considered necessary to avoid the feared abuse. Social Security Amendments of 1967, Pub. L. 90–248, § 112(a), 81 Stat. 838–839; see 42 U.S.C. 402(d)(8)(E). See *Morris* v. *Richardson*, 455 F. 2d 775 (C.A. 4), certiorari dismissed as improvidently granted, 410 U.S. 422.

In 1972, Congress withdrew benefits for children who were not adopted by a wage earner prior to the disability unless the child had been living with and receiving at least one-half of his support from the wage earner for at least a year prior to his entitlement to disability benefits. 42 U.S.C. 402(d)(8)(D) (1970 ed., Supp. II). The new requirements were imposed to insure that "benefits for a child who is adopted by a worker already getting old-age or disability benefits should be paid only when the child lost a source of support because his parent retired or became disabled, and that the law should include safeguards against abuse through adoption of children solely to qualify them for benefits." See S. Rep. No. 92–1230, 92d Cong., 2d Sess., p. 141. In 1973, the provision was slightly broadened to include

Appellants contend (Br. 27–36), however, that such cases as *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, and *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, preclude the government from relying upon administrative burdens as a justification for the statutory provisions. In those cases the Court did not hold that administrative burdens were irrelevant, but only that a classification purportedly designed to avoid those burdens must be rationally related to the correction of abuses which could reasonably be contemplated. The present classification is carefully drawn to prevent spurious claims, and to limit benefits to children most likely to have lost support from a wage earner's disability. In light of the overall reasonableness of the classification, the government properly may rely upon prospective administrative burdens to justify the Congressional classification. Indeed, this Court has recognized, although in a different context, that administrative burdens and the attendant "drain on the [Social Security] trust fund" are relevant in considering the provisions of the Social Security Act. *Richardson* v. *Perales*, 402 U.S. 389, 406.

The Social Security program is based on actuarial considerations. At any particular tax level only a certain amount of total benefits can be provided. Each

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grandchildren of the wage earner (or of the wage earner's spouse), who can now qualify if they can satisfy the special dependency requirements of Section 202(d)(8) at the time they file their applications. P.L. 93–66, Section 240(a); 87 Stat. 161. This continuing changing of qualifications illustrates Congress' endeavor to extend the Act's coverage while at the same time minimizing the potential for abuse.

533-480—74——4

amendment of the Social Security Act is carefully considered in light of its effect on the balance of the system. See, *e.g.,* S. Rep. No. 404, 89th Cong., 1st Sess., p. 135. Since the total amount available for benefits is limited, Congress properly may extend benefits to a class for the vast majority of whose members the Social Security system was intended to provide, while declining to extend benefits to another group containing a lesser proportion of such persons.

The fact that the Act does not afford relief for every aspect of the problem it was designed to solve does not invalidate it under the Due Process Clause. The legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"; it "may select one phase of one field and apply a remedy there, neglecting the others" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489).

In rejecting a recent constitutional challenge to Texas' welfare system which provides a lower percentage of need for recipients of Aid to Families with Dependent Children than for elderly or blind welfare recipients, this Court said:

> This Court emphasized only recently, in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), that in "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them. [*Jefferson* v. *Hackney*, 406 U.S. 535, 546–547.]

Finally, since the legislative classification is a reasonable one, appellants cannot escape its application by the claim that the evils with which Congress was concerned do not exist in their particular case. *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 710–711; cf. *Dandridge* v. *Williams*, 397 U.S. 471, 485.

*Griffin* v. *Richardson*, 409 U.S. 1069, affirming 346 F. Supp. 1226 (D. Md.), and *Davis* v. *Richardson*, 409 U.S. 1069, affirming 342 F. Supp. 588 (D. Conn.), upon which appellants rely (Br. 25), are distinguishable. Those decisions invalidated 42 U.S.C. 403(a), which provided that when a family had so many children otherwise qualified for benefits that the total would exceed the maximum family benefit limit, illegitimate children would be denied benefits so that the other children could receive their full amount. There, the illegitimate children were otherwise qualified for benefits, but were denied them because the legitimate children's claims exhausted the amount to which the family was entitled. Here, the illegitimate children do not qualify for any benefits, and thus are not deprived of benefits to which they are otherwise entitled.

Similarly inapposite is *Gomez* v. *Perez*, 409 U.S. 535, which held that a state may not require a father

to support only his legitimate children but not his illegitimate children. As shown above, in the Social Security Act benefits are provided to illegitimate children on a basis which furthers the statutory purpose of replacing support lost by a wage earner's disability. In contrast, the Texas scheme at issue in *Gomez* excluded an illegitimate child from the right to obtain support from its father "simply because its natural father has not married its mother." 409 U.S. at 538. Unlike the statutory provisions here involved, the Texas statute had no rational basis.

## III

### THE VALIDITY OF THE PROVISIONS OF THE SOCIAL SECURITY ACT HERE CHALLENGED DEPENDS UPON WHETHER THEY ARE RATIONALLY BASED AND NOT UPON WHETHER THEY SERVE A COMPELLING STATE INTEREST

In *Richardson* v. *Belcher,* 404 U.S. 78, 81, this Court reaffirmed that a legislative classification in a social welfare statute does not deny equal protection or due process if it is "rationally based and free from invidious discrimination." This Court had articulated the "rational basis" test in *Dandridge* v. *Williams,* 397 U.S. 471, 485:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequal-

> ity." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69–70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426.

The Court further ruled in *Dandridge* that the justification for the challenged statutory classification was sufficient even though it would not apply to all the members of the class. See *supra*, pp. 19, 23.

The present case, like *Richardson* v. *Belcher*, 404 U.S. 78, and *Dandridge* v. *Williams*, 397 U.S. 471, involves not "freedoms guaranteed by the Bill of Rights" (*Dandridge*, 397 U.S. at 484), but benefits provided by statute "[i]n the area of * * * social welfare." *Id.* at 485. Therefore, it is the "rational basis" test, rather than the stricter "compelling [state] interest" test (see *Shapiro* v. *Thompson*, 394 U.S. 618, 634; *Carrington* v. *Rash*, 380 US. 89), which governs the validity of the Social Security Act provisions here involved. Every court that has considered the constitutionality of the various provisions of the Social Security Act relating to illegitimate children has applied the rational basis test. *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), affirmed, 409 U.S. 1069; *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), affirmed, 409 U.S. 1069; *Watts* v. *Veneman*, 476 F. 2d 529 (C.A.D.C.); *Beaty* v. *Wein-*

*berger,* 478 F. 2d 300 (C.A. 5) pending on appeal to this Court, No. 73–521; *Severance* v. *Weinberger,* 362 F. Supp. 1348 (D. D.C.); *Norton* v. *Weinberger,* 364 F. Supp. 1117 (D. Md.).

Contrary to appellants' argument (Br. 39–43), the constitutional validity of the Social Security Act provisions here challenged do not require the strict scrutiny appropriate to review of statutes which discriminate on the basis of a "suspect category," such as race. The Social Security Act does not deny benefits to all illegitimate children. See *supra,* pp. 2–3, 14. Under 42 U.S.C. 402(d) and 42 U.S.C. 416(h), most illegitimate children are entitled to benefits.

With reference to the specific classification at issue here, illegitimate children born after the wage earner became disabled, as were Eugenio and Alicia, may qualify for benefits under the Act in states where they would inherit personal property from the wage earner under intestacy laws, 42 U.S.C. 416(h)(2)(A).[13] Post-disability illegitimate children may also qualify if their illegitimacy results from certain defects in their parents' ceremonial marriage, 42 U.S.C. 416(h)(2)(B). In addition, a child born illegitimately may receive benefits if he is legitimated in accordance with state law. See 42 U.S.C. 402(d)(3)(A); Social Security Administration Claims Manual 2421. Therefore, with respect to post-disability illegitimate children, the Act's exclusion is based not upon illegitimacy *per se,* but

[13] See Appendix B, *infra,* in which we have set forth the current sections of the Social Security Administration Claims Manual under which children's qualifications under 42 U.S.C. 416(h)(2)(A) are determined, and the state laws from which these state-by-state criteria are derived.

upon the circumstances of the child's illegitimate birth and State-determined consequences of the child's illegitimate status. These are factors which, as we have shown, substantially relate to the Act's purpose of replacing support lost when a wage earner becomes disabled. See *Norton* v. *Weinberger,* 364 F. Supp. 1117, 1122 (D. Md.) pending on appeal to this Court, No. 73–5598.

In any event, illegitimacy *per se* has not been, nor should it be declared a "suspect category." See *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619; *Gomez* v. *Perez,* 409 U.S. 535; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164; *Labine* v. *Vincent,* 401 U.S. 532; *Levy* v. *Louisiana,* 391 U.S. 68; *Glona* v. *American Guarantee Co.,* 391 U.S. 73. Illegitimacy of birth differs importantly from the categories that have been viewed as suspect and hence subject to strict scrutiny. Illegitimacy is not a highly visible characteristic, and the status can be changed.[14] See *Frontiero* v. *Richardson,* 411 U.S. 677, 686–687.

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[14] Under Illinois law (applicable to appellants' eligibility under 42 U.S.C. 416(h)(2)(A)), children whose parents' ceremonial marriage is void are legitimate, Ill. Ann. Stat. ch. 89, § 17a. An illegitimate child whose parents marry and who is acknowledged by the father as his child is legitimated, Ill. Ann. Stat. ch. 3, § 12. States other than Illinois afford various procedures for legitimating children born out of wedlock. See generally, Krause, *Illegitimacy: Law and Social Policy,* pp. 9–21 (1971). Moreover, the children's status under the Social Security Act is not immutable. For example, Alicia and Eugenio would qualify for benefits if Ramon adopted them. See 42 U.S.C. 402(d)(3), 416(e) and Ill. Ann. Stat. ch. 4, Sections 9.1–2 and 9.1–3. See also 42 U.S.C. 402(d)(8)(C), as amended, Social Security Amendments of 1972, P.L. 92–603, Section 111(a), 86 Stat. 1346–1347. Also, the father of illegiti-

## CONCLUSION

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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MARCH 1974.

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mate post-disability children may take action in many states, short of marriage or adoption, that would qualify them to inherit from him, and thus become eligible for benefits under 42 U.S.C. 416(h)(2)(A). See Appendix B, *infra*.

## Appendix A

Section 202(d) of the Social Security Act, 42 U.S.C. 402(d), provides in pertinent part:

(d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

* * * * *

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit * * *.

* * * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

* * * * *

Section 216 of the Social Security Act, 42 U.S.C. 416 provides in pertinent part:

(e) The term "child' means (1) the child or legally adopted child of an individual, * * *.

* * * * *

(h)(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such in-

sured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1) (B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

* * * * *

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he was entitled to old-age insurance benefits—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be

the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began; * * *.

* * * * *

## Appendix B

The Social Security Administration Claims Manual, set forth below in pertinent part, provides a listing of the criteria used to determine when an illegitimate child may qualify under 42 U.S.C. 416(h)(2)(A) provided the requirements of 42 U.S.C. 402(d)(3) are also met. The statutory authority for each provision is enclosed in parentheses following the name of the State.

### 2424.5 Individual State Laws on Legitimation and Recognition

Section 2424.6 shows how a child or parent can acquire status as such under State law. See § 2424.7 for the date from which legitimation is effective.

In § 2424.6 certain acts giving a child status are marked with the symbol "D." This means that the act so marked constitutes acknowledgment of the child for inheritance purposes, but does not constitute legitimation; therefore, while the act establishes the relationship of the child to the parent, the child's dependency on the parent is established only if the child meets either one of the two dependency tests for illegitimates set out in § 2654.

### 2424.6 Digest of State Laws on Acts Constituting Legitimation or Acknowledgment

Alabama (Alabama Code, Tit. 27, § 10 (1958); Tit. 27, § 11 (Supp. 71)).—Child acquires status of child if (1) parents intermarry and father recognizes child, or (2) father makes declaration in writing attested by two witnesses, setting forth child's name, sex, age, name of mother, and stating that he thereby recognizes it as his child, capable of inheriting his estate, real and personal, as if born in wedlock; the declaration

must be acknowledged before probate judge of county of residence or proved by attesting witnesses, filed in office of probate judge, and recorded on minutes of his court.

Father acquires status of parent if parents intermarry and father recognizes child.

Alaska (Alaska Statutes, § 25.20.050 (1962)).—Child or father acquires status of child or parent if (1) parents intermarry, or (2) father acknowledges paternity of child in writing (does not apply if father or child died before 6/1/60), or (3) father adjudged to be the father by a superior court.

Arizona.—In order for child or father to acquire status of child or parent, neither recognition nor legitimation is necessary if child born after 3/17/21 (see § 2420.6).

Arkansas (Arkansas Stat. Ann., § 61–141).—Child or father acquires status of child or parent if parents intermarry and father recognizes child.

California (Cal. Prob. Code, § 255 (Supp. 1972)).—Child acquires status of child if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child, or (3)(D) father acknowledges child in writing signed in presence of competent witness.

Father acquires status of parent if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child.

Colorado (Colo. Rev. Stat. Ann., § 153–2–8 (1963)).—Child acquires status of child if (1)(D) parents intermarry and father subsequently recognizes child, or (2)(D) if father alive after 5/11/59, the father during his lifetime in writing, by his conduct,

or otherwise acknowledged the child to be his and regularly contributed to his support and maintenance for a reasonable period prior to his death.

Father acquires status of parent if child is alive after 5/11/59 and (1) the parents intermarry and father subsequently recognizes child, or (2) father, during child's lifetime in writing, by his conduct, or otherwise acknowledged the child to be his and regularly contributed to his support and maintenance for a reasonable period prior to his death.

Connecticut (Conn. G.S.A., § 45–274 (1958)).—Child or father acquires status of child or parent if parents intermarry.

Delaware (Del. C. § 1301 (1953), 1304 (Supp. 70)).—Child or father acquires status of child or parent if (1) parents intermarry before the child's birth or (2) they intermarry after adjudication of parentage after child's birth or (3) they intermarry after acknowledgment of parentage after child's birth; or (4) there is written acknowledgment of child's paternity on or after 12/7/65 by both parents if both are living, or by father if mother has died, and such acknowledgment is filed in Prothonotary's office of any Delaware county. Submit to regional attorney under § 4529(*d*)(2) cases where acknowledgment of paternity occurred before 12/7/65 and parents have not intermarried.

District of Columbia (D.C. Code § 16–2345).—Child or father acquires status of child or parent if parents intermarry and father acknowledges child.

Florida (Fla. Stat. Ann., §731.29 (1963)).—Child acquires status of child if (2) parents intermarry, or (2)(D) father acknowledges himself to be such in writing signed in presence of competent witness.

Father acquires status of parent if parents intermarry.

Georgia (Ga. Code Ann., §74–104 (1964)).—Child acquires status of child if (1) mother and reputed father intermarry and father recognizes child, or (2) decree of superior court of county of father's residence legitimates child upon petition of father.

Father acquires status of parent if mother and father intermarry and latter recognizes child.

Hawaii (Hawaii Rev. Stat., §338–21 (1968)).—Child or father acquires status of child or parent if parents intermarry.

Idaho (Idaho Code, §15–2–109 (Supp. 1971)).—Child acquires status of child if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child or (3) a court finds that an individual is the father of a child and makes an order of filiation declaring paternity, provided that the child was conceived on or after 5/26/69, or (4)(D) father acknowledges child in writing signed in presence of competent witness.

Father acquires status of parent if (1) parents intermarry, or (2) a court finds that an individual is the father of a child and makes an order of filiation declaring paternity, provided that the child was conceived on or after 5/26/69 or, (3) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child.

Illinois (Ill. Ann. Stat., Prob. Act § 12 (Supp. 73)).—Child or father acquires status of child or father if parents intermarry and father acknowledges child.

Indiana (Ind. Stat. Ann., § 6–207 (1953)).—Child or father acquires status of child or father if (1) prior to 1/1/54, parents intermarry and father acknowl-

edges child (legitimating father need not be natural father of child); or (2)(D) effective 1/1/54, parents intermarry and father acknowledges child (acknowledging father must be putative father of child); or (3)(D) effective 1/1/54, paternity of child is established by law during father's lifetime; or (4)(D) where father died, or application in a life case was filed, before 1/1/54, father theretofore acknowledged child.

Iowa (Ia. Code, § 633.222 (1963)).—Child acquires status of child if (1) parents intermarry, or (2)(D) paternity is proven during father's lifetime, or (3)(D) father recognizes child and recognition is either general and notorious or in writing.

Father acquires status of parent if (1) parents intermarry, or (2) father's recognition of child has been general and notorious or in writing, and the recognition of the relationship was mutual.

Kansas (Kan. Stat. Ann., §§ 23-125, 126; 59-501 (1963)).—Child acquires status of child if (1) parents intermarry and recognize child; or (2)(D) father has notoriously or in writing recognized paternity of child; or (3)(D) paternity has been determined in father's lifetime in any action or proceeding involving that question in court of competent jurisdiction.

Father acquires status of parent if (1) parents intermarry and recognize child; or (2) father has notoriously or in writing recognized paternity of child; or (3) paternity has been determined in father's lifetime in any action or proceeding involving that question in court of competent jurisdiction.

Kentucky (Ky. Rev. Stat. Ann., § 391.090 (Baldwin, 1973)).—Child or father acquires status of child or parent if parents intermarry and father recognizes child.

Louisiana (La. Civil Code, § 202 *et seq.*).—There are four classes of children born out of wedlock:

(A) A child born of parents who could have married at the time child was conceived can be legitimized or acknowledged as indicated in (1) through (4) below.

(1) If parent was alive after noon of 7/26/44, child acquires status of child and each parent whenever the parents have intermarried and have formally or informally acknowledged the child as their child, either before or after the marriage. (Whether the marriage or the acknowledgment took place before or after noon of 7/26/44, is immaterial.) If parent died before noon of 7/26/44, child acquired status of child and each parent acquired status of parent if parents intermarried and legally acknowledged child as their own either before a marriage by declaration before a notary public and two witnesses, or informally to the person performing the marriage.

(2) Child acquires status of child as to acknowledging parent and acknowledging parent acquires status of parent if child is acknowledged in writing before notary public and two witnesses, and a statement is included declaring intention of parent making declaration to legitimate the child, *provided* the acknowledging parent does not have legitimate ascendants or descendants.

(3)(D) Child acquires status of child as to acknowledging parent and acknowledging parent acquires status of parent if child is acknowledged in registering birth or baptism of child, or by declaration in writing before notary public and two witnesses.

If parent is the father, dependency must be established by living with or contributions toward support from the acknowledging father. If parent is the mother, see § 2654.

(4)(D) Informal acknowledgment may be sufficient for child to acquire a child's status, but if parent if the father, dependency must be established by living with or contributions toward support from the acknowledging father. If parent is the mother, see § 2654.

Informal acknowledgment is not sufficient for mother or father to acquire a parent's status.

Submit to the regional attorney under § T4510(*d*)(2) cases involving the status of mother and child in which there is proof of maternity alone without evidence of acknowledgment by the mother.

(B) A child born to parents one or both of whom were married to another individual when the child was conceived is known as an adulterous illegitimate child.

An adulterous illegitimate child could not have been acknowledged or legitimated by a parent who died before noon of 7/28/48. If the parent died after that time, an adulterous illegitimate child is legitimated by the subsequent valid marriage of his parents if the parent(s) formally or informally acknowledged him either before or after the marriage ceremony. (See § 2411 for necessity of disavowal action by mother's legal spouse.)

(C) A child born to persons who are related to a degree within which marriage between them is prohibited (an incestuous illegitimate child) cannot be legitimated or acknowledged.

(D) A child born to persons whose marriage was not valid because of some legal impediment which existed when the child was conceived. This child can be acknowledged as shown in (A) (2), (3), and (4) if the impediment is not a previous undissolved marriage. The child is legitimated by a subsequent valid marriage of the parents and the formal or informal acknowledgment of the child before or after the cere-

mony. The child is also legitimated if the marriage of his parents is validated by statute.

Generally, where a marriage has been dissolved by divorce on the grounds of adultery, the remarriage of the guilty spouse with his or her accomplice in adultery is void and children born of such marriage are not legitimate except under the following circumstances. If such marriage was contracted before noon 7/30/58, children born of the marriage are deemed legitimate as of noon 7/30/58, or as of the date of birth whichever is later. If the marriage was contracted after noon 7/30/58, and before noon 8/1/62, children born of the marriage are deemed legitimate as of 8/1/62, or as of the date of birth whichever is later. The validations mentioned do not apply to a marriage which is dissolved by the death of one of the parties prior to the effective date, and children born of such marriage are not legitimate. If the marriage had been judicially dissolved before the pertinent effective date, submit to the regional attorney under § T4510 (*d*)(2). Submit to the regional attorney under § T4510 (*d*)(2) if claimant contends child is legitimate from birth rather than effective date under this validation provision. If such marriage was contracted after noon of 8/1/62, and before 12/31/62, children born thereof are legitimate from birth, and children born prior to such marriage are legitimated from the date of such marriage, if acknowledged either formally or informally before or after the ceremony. If the marriage was contracted on or after 12/31/62 and prior to noon of 7/27/66 and was in existence on 7/27/66, children born of the marriage are deemed legitimate. As to the date as of which a child of such marriage is deemed legitimate, submit to the regional attorney under § T4510 (*d*)(2), where material.

Maine (18 Maine Rev. Stat. Ann., § 1003 (1964)).—Child or father acquires status of child or parent if (1) parents intermarry; or (2) father adopts child into his family; or (3) father acknowledges in writing before justice of the peace or notary public that he is the father.

Maryland (93 Md. Ann. Code, § 1-208 (1957)).—Child or father acquires status of child or parent if parents intermarry and father acknowledges child, or (2)(D) if the father is alive on or after 1/1/70, child acquires status of child also if father has been judicially determined to be father of child in paternity proceedings or father has acknowledged himself, in writing, to be father or father has openly and notoriously recognized child to be his child.

Massachusetts (Mass. Gen. Laws Ann., Ch. 190, § 7 (West, 1958)).—Child or father acquires status of child or parent if (1) parents intermarry and father acknowledges child, or (2) effective 3/11/43, parents intermarry and alleged father is adjudged the father of the child by court in action against him under statute providing penalty for getting woman other than lawful wife with child.

Michigan (Mich. Stat. Ann., § 27.3178 (153) (Supp. 73)).—Child or father acquires status of child or parent if (1) parents intermarry; or (2) father on or before 1/9/42, acknowledged child by writing, under his own hand, executed and acknowledged in the same manner as for deeds of real estate and recorded in office of judge of probate of county in which father was resident; or (3) on or after 1/10/42, father and mother acknowledged child by writing under their hands, executed and acknowledged in the same manner as for deeds of real estate and recorded in office of judge of probate of county in which father

or mother is resident. It is not necessary for the mother to join in the acknowledgment where she is disqualified to act by reason of insanity, mental capacity, death, or if for any other reason satisfactory to the probate judge, it is not practical for her to do so.

Minnesota (Minn. Stat. Ann., § 525.172 (West, 1969)).—Child acquires status of child if (1) parents intermarry, or (2)(D) father in writing before competent attesting witness had declared self to be father of child, or (3)(D) death of the father occurs on or after 4/21/71, and father has been determined to be the father of the child in a paternity proceeding before a court of competent jurisdiction.

Father acquires status of parent if parents intermarry.

Mississippi (Miss. Code Ann., § 91–1–11, 93–17–1, 93–9–29 (1972)).—Child acquires status of child if (1) parents intermarry and father acknowledges child, or (2) chancery court, upon petition of father, has legitimated child, or (3)(D) after 6/30/62, the county, circuit, chancery, or family court expressly grants inheritance rights in paternity and support of child order.

Father acquires status of parent if parents intermarry and father acknowledges child.

Missouri (Mo. Stat. Ann., § 474.070 (Vernon, 1956)).—Child or father acquires status of child or parent if parents intermarry and father recognizes child.

Montana (Montana Rev. Codes Ann., § 91–404 (1964)).—Child acquires status of child if (1) parents intermarry, or (2) before 7/1/57, an illegitimate child was legitimated if the father publicly acknowledged the child, received it as such into his family (with wife's consent if he was married), and otherwise

treated it as his legitimate child, or (3)(D) father acknowledges child by statement in writing signed in presence of competent witness.

Father acquires status of parent if (1) parents intermarry, or (2) before 7/1/57, father publicly acknowledged the child, received it as such into his family (with wife's consent if he was married), and otherwise treated it as his legitimate child.

Nebraska (Nebraska Rev. Stat., § 30–109 (1964)).—Child acquires status of child if (1)(D) father in writing signed in presence of competent witness acknowledged himself to be father of child, (2) effective 8/24/41, parents intermarry.

Father acquires status of parent if parents intermarry.

Nevada (Nev. Rev. Stat., § 134.170 (1967)).—Child acquires status of child if (1) parents intermarry, or (2) before 3/28/53, father publicly acknowledged child as his own or received it as such into his family (with wife's consent if he was married), or otherwise treated it as his legitimate child, consent of mother of child being necessary unless she had been deprived of civil rights, judicially deprived of child's custody, or declared incurably feebleminded or insane by a court, or had deserted child without provision for her identification; or (3)(D) father acknowledges child as his own by statement in writing signed in presence of competent witness. The witness must also sign the acknowledging writing.

Father acquires status of parent if (1) parents intermarry, or (2) before 3/28/53, father publicly acknowledged child as his own or received it as such into his family (with wife's consent if he was married), or otherwise treated it as his legitimate child, consent of mother of child being necessary unless she had been deprived of civil rights, judicially de-

prived of child's custody, or declared incurably feeble-minded or insane by a court, or had deserted child without provision of her identification.

New Hampshire (New Hampshire Rev. Stat. Ann., § 457.42 (1968)).—Child or father acquires status of child or parent if parents intermarry and father recognizes child.

New Jersey (N.J. Stat. Ann., § 3A:4–7 (West, 1953)).—Child or father acquires status of child or parent if parents intermarry and treat child as their own.

New Mexico (N.M. Stat. Ann., § 29–1–18 (Supp. 73), 29–1–20 (1953)).—Ignore the bracketed material in the following sentence if the WE died, or application is filed in a life case, after 6/13/47.

Child acquires status of child if (1) parents intermarry, or (2)(D) father has recognized child [and recognition has been either (*a*) general and notorious, or (*b*)] in writing signed by reputed father [in presence of 2 competent witnesses] showing upon its face that it was signed with intent to recognize child as heir.

Father acquires status of parent if (1) parents intermarry, or (2) father has recognized child (see requirements in (2) above), and recognition of relationship has been mutual.

New York (N.Y. Est. Powers, and Trust Law, § 4–1.2 (West, 1967)).—Child or father acquires status of child or parent if (1) parents intermarry, or (2)(D) during lifetime of father, court of competent jurisdiction has issued Order of Filiation declaring paternity in a proceeding instituted during mother's pregnancy or within 2 years after child's birth. This latter provision is applicable only where death of father occurred on or after 3/1/66 or, in life cases, to benefit applications effectively filed on or

after that date and applies regardless of whether order declaring paternity was issued before, in or after 3/66, but provision confers inheritance rights only on or after 3/1/66.

North Carolina (Gen. Stat. of N.C., § 29–18 (1966)).—Child acquires status of child if (1) parents intermarry, or (2) child is legitimated by superior court upon petition of reputed father.

Father acquires status of parent if child is legitimated by superior court upon petition of reputed father.

North Dakota (N.D. Cent. Code § 56–01–05 (Supp. 1969)).—In order for a child or father to acquire the status of child or parent, neither recognition nor legitimation is necessary if the child was born in North Dakota before 1/17/45 or after 6/30/69 (see § 2420.6). If the child was born after 1/16/45 but before 7/1/69, the child may acquire the status of child if there is compliance with the California rules in this section as to legitimation and acknowledgment. If the child cannot acquire status of child under these rules, submit the case to the regional attorney under § 4529(*d*)(2) to determine the status of the child under section 56–01–05 of the North Dakota Century Code.

Ohio (Ohio Rev. Code Ann. § 2105.18).—Child acquires status of child if (1) parents intermarry and father acknowledges child, or (2) effective 10/14/53, the child born to an unmarried woman is declared legitimate by probate court decree upon the application and acknowledgement of the child's father and with the consent of the child's mother or, if the mother is deceased, incompetent or has surrendered custody of the child, with the consent of the person or agency having custody of the child, or of the court having jurisdiction over the child's custody, or (3)(D) a prop-

erly executed declaration of heirship is filed by the parent with the probate judge of the county.

Father acquires status of parent if (1) parents intermarry, or (2) effective 10/14/53, the child born to an unmarried woman is declared legitimate by probate court decree upon the application and acknowledgment of the child's father and with the consent of the child's mother or, if the mother is deceased, incompetent or has surrendered custody of the child, with the consent of the person or agency having custody of the child, or of the court having jurisdiction over the child's custody, or (3) a properly executed declaration of heirship is filed by the child when of sufficient age, with the probate judge of the county.

Oklahoma (Okla. Stat. Ann., Tit. 84, § 215 (1961); Tit. 10, 55 (1961)).—Child acquires status of child if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child, or (3)(D) father acknowledges child in writing signed in presence of competent witness.

Father acquires status of parent if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his own.

Oregon (Ore. Rev. Stat. §§ 111.231, 109.060 (1957)).—In order for child or father to acquire status of child or parent, neither recognition nor legitimation is necessary (see § 2420.6). Child is legitimate from date of birth regardless of whether or not WE was alive on date legislation enacted, 8/20/57.

Pennsylvania (Con. Penna. Statutes, Tit. 20, § 2107 (1972)).—Child or father acquires status of child or parent if parents intermarry.

Rhode Island (Gen. Laws of R.I., § 33–1–8 (1956)).—Child or father acquires status of child or parent if parents intermarry and father acknowledges child.

South Carolina (Code of Laws of S.C., § 20–5.1 (1962)).—Child or father acquires status of child or parent if (1) parents intermarry, or (2) children's court, upon petition of putative father, declares child legitimate.

South Dakota (S.D. Compiled Laws Ann., § 29–1–15 (1967)).—Child acquires status of child if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child, or (3)(D) father acknowledges child in writing signed in presence of competent witness.

Father acquires status of parent if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child.

Tennessee (Tenn. Code. Ann., § 36–307 (1956), 36–302, 306, § 36–234 (Supp. 71)).—Child acquires status of child if (1) child is declared legitimate by decree of circuit, probate, or county court or after *3/9/65 by decree of juvenile court*, or (2) parents intermarry and after 3/30/49, father recognizes child, or (3)(D) after 3/14/55, an order of paternity and support of child has been entered by juvenile court following father's conviction in bastardly proceeding.

Father acquires status of parent if parents intermarry and after 3/30/49, father recognizes child.

Texas (Ann. Tex. Stat. Probate Code, § 42 (Vernon, 1956)).—Child or father acquires status of child or parent if parents validly intermarry subsequent to

birth of child and, before 1/1/56, father recognizes child. After 12/31/55, valid marriage of parents and proof that parent was biological father is sufficient.

Utah (Utah Code Ann., 77–60–14 (Supp. 73); 74–4–10 (1953)).—Child acquires status of child if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child, or (3)(D) father acknowledges himself to be the father.

Father acquires status of parent if (1) parents intermarry, or (2) father publicly acknowledges child as his own, receives it as such into his family (with wife's consent if he is married) and otherwise treats it as his legitimate child.

Vermont (Vermont Stat. Ann., Tit. 14, § 554 (1959); § 553 (Supp. 73)).—Child acquires status of a child if (1) parents intermarry and father recognizes child, or (2)(D) the child acquires the status of a child under Title 14, Sec. 553 of the Vermont Statutes Annotated, as amended in 1968, if the father is alive on 3/26/68 and (*a*) he has been declared the putative father of the child in a Vermont bastardy proceeding (Sec. 339 of Title 15 of the Vermont Statutes Annotated) or (*b*) he has openly and notoriously claimed the child to be his. Where judgment in a bastardy proceeding or open and notorious claim of paternity by father occurred prior to 3/26/68, or where after development it is not clear as to whether evidence is sufficient to show open and notorious claim of paternity, submit to regional attorney under § 4529 (*d*)(2) for an opinion.

Father acquires status of parent if the parents intermarry and father recognizes child.

Virginia (Code of Va., § 64.1–6 (1950)).—Child or father acquires status of child or parent if parents intermarry and father recognizes child.

Washington (Wash. Rev. Code. Ann., § 11.04.081 (B–W, 1967)).—Child acquires status of child where (1) parents intermarry, or (2)(D) effective 7/1/67, the child acquires the status of a child if the father acknowledges him in writing. Proof of actual paternity is not necessary.

Father acquires status of parent if parents intermarry.

Before 7/1/67 the child acquires the status of child if father acknowledges child by statement in writing signed in presence of competent witness. Submit the case to the regional attorney through channels for an opinion, if the acknowledgment is not signed in the presence of a competent witness and one or more of the following questions are involved and material to entitlement.

(1) What is the effect if the father executed such an acknowledgment and died prior to 7/1/67?

(2) What is the effect of an acknowledgment that was executed prior to 7/1/67?

(3) Whether the acknowledgment enables the father to acquire inheritance rights from the child.

(4) If such acknowledgment permits the father to acquire inheritance rights from the child, would this also apply if the child died prior to 7/1/67?

West Virginia (W. Va., Code, § 42–1–6 (1966)).—Child or father acquires status of child or parent if parents intermarry. (Before 1/1/31, parents must have intermarried and father must have recognized the child.)

Wisconsin (Wisc. Stat. Ann., § 245.25 (Supp. 72); § 852.05 (1971)).—Child acquires status of child if (1) parents intermarry, or (2)(D) individual (*a*) acknowledges himself to be father of child in writing signed in presence of competent witness (in the case of death of acknowledging individual after 3/31/71 or if such acknowledgment occurred after 3/31/71, acknowledgment in writing need not be in presence of competent witness), or (*b*) has been adjudged in bastardy proceeding to be the father, or (*c*) has admitted in open court that he is the father.

Father acquires status of parents if parents intermarry.

Wyoming (Wyo. Stat. §§ 2–44, 35–60 (1957)).—Child acquires status of child if parents intermarry and father subsequently recognizes child.

Such intermarriage and recognition legitimates the child rather than only recognizing the child for inheritance purposes as was previously shown in this section. This represents a change of position effective 5/8/64, and claims denied on or after that date may be reopened under the rules of administrative finality based on an error on the face of the evidence.

Father acquires status of parent if parents intermarry and father subsequently recognizes child.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6609

EUGENIO and ALICIA JIMENEZ, by their father and next friend, RAMON JIMENEZ, *et al.*,
*Appellants,*

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

## REPLY BRIEF FOR APPELLANTS

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## TABLE OF CONTENTS

Page

ARGUMENT:

I. The Secretary of Health, Education and Welfare Misinterprets the Purpose of The Social Security Act; Furthermore, Contrary to His Arguments, The Invidious Discrimination Herein is Not Rationally Related to the Actual Purpose of The Act. . . . . 1

II. The Secretary is Reduced to Defending the Discrimination as a Rational Means of Preventing Fraud, A Theory not Rationally Related to the Facts or Statute and Consistently Rejected by This Court. . . . . 6

III. Illegitimacy is a Suspect Classification; The Secretary has Neither Refuted this Proposition, Nor Offered a Compelling Governmental Interest that Could Justify Discrimination Against A Suspect Class. . . . . 7

CONCLUSION . . . . . 12

## TABLE OF CASES

*Cases:*

Brown v. Board of Ed., 347 U.S. 483 (1954) . . . . . 9, 11

Cleveland Board of Ed. v. LaFleur, __ U.S. __, 42 U.S.L.W. 4186 (1974) . . . . . 7

Dandridge v. Williams, 397 U.S. 471 (1970) . . . . . 8

Frontiero v. Richardson, 411 U.S. 677 (1973) . . . . . 10

Graham v. Richardson, 403 U.S. 365 (1971) . . . . . 8, 9, 10

Hirabayashi v. U.S., 320 U.S. 81 (1942) . . . . . 10

Jefferson v. Hackney, 406 U.S. 535 (1972) . . . . . 8

Johnson v. Robison, __ U.S. __, U.S.L.W. 4313 (1974) . . . . . 10

Page

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) . . . . . 9, 10

Stanley v. Illinois, 405 U.S. 645 (1972) . . . . . 6

Sugarman v. Dougall, __ U.S. __, 37 L. Ed. 2d 853 (1973) . . . . . 10

U.S. v. Carolene Prod. Co., 304 U.S. 144 (1938) . . . . . 9

U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) . . . . . 6, 7

Vlandis v. Kline, __ U.S. __, 37 L. Ed. 2d 63 (1973) . . . . . 6, 7

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) . . . . . 2, 5, 10, 11

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v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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## REPLY BRIEF FOR APPELLANTS

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## ARGUMENT

### I.

### THE SECRETARY OF HEALTH, EDUCATION AND WELFARE MISINTERPRETS THE PURPOSE OF THE SOCIAL SECURITY ACT; FURTHERMORE, CONTRARY TO HIS ARGUMENTS, THE INVIDIOUS DISCRIMINATION HEREIN IS NOT RATIONALLY RELATED TO THE ACTUAL PURPOSE OF THE ACT.

The central argument of the Brief of the Secretary of Health, Education and Welfare is that the challenged in-

vidious discrimination effected by section 216(h)(3)[1] of the Social Security Act is constitutionally valid because it is rational in light of the purpose of the Act, which he alleges to be the replacement of pre-existing support lost by a dependent when a wage earner is no longer able to work. Not only does the Secretary measure the discrimination by the wrong standards (as discussed in Part III, *infra*, p. 7 ), but he also misstates the purpose of the Social Security Act.

If the purpose of the Act were merely to replace previously received support, no child would be eligible to receive Social Security benefits who had not had actual experience of support by the wage earner while the wage earner was working. That is far from the case. It is obvious that *no* children born after their fathers have ceased working will have been so supported, yet legitimate children born after their fathers have ceased working and become eligible for Social Security benefits, are not excluded from eligibility. The distinction between birth before and birth after disability is applied only to illegitimate children.[2] Replacement of support is not the exclusive purpose of the Social Security Act.

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[1] Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) discriminates against illegitimate children therein defined by requiring that they must have been born and have met certain other requirements before the onset of their fathers' disability or old age, in order to qualify for benefits themselves.

[2] It is true, as the Secretary points out in his brief (p. ), that the section does not discriminate against *all* illegitimate children: some illegitimate children qualify for benefits under section 216(h)(2)(B) and they need not have been born before the onset of their fathers' eligibility, and some illegitimate children meet the condition of having been born before their fathers become eligible for Social Security and so are eligible. The fact that not *all* illegitimate children suffer from the discrimination does not make it any less a discrimination against illegitimate children. In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court stated that

The purpose of the Social Security Act is in fact to *provide present support* to a wage earner and/or his dependents when the wage earner cannot work because of old-age, disability, or death. (See Appellant's Brief, p. 16) And, contrary to the Secretary's allegations, the discrimination complained of here is prefectly irrational in light of that purpose.

The Secretary depends heavily in his brief on the argument that it is rational for Congress to attempt to provide benefits to those children "upon whom a wage earner's disability is likely to have the most serious impact," because of their fathers' inability to work. (Brief for Appellee, p. ) The plaintiffs do not contest this point—indeed, they agree with it: it is rational for Congress to provide Social Security benefits to those most likely to suffer because of their parents' inability to work. But the discrimination complained of here is not a discrimination between those more and those less likely to have suffered "the most serious impact." The general likelihood of support for illegitimate children, apparently crucial to the Secretary, is not in fact relevant in this case.

The plaintiffs in this case, Eugenio and Alicia Jimenez, meet all the requirements of section 216(h)(3) except the requirement that they must have been born before their

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"[I]t makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy;* the discrimination remains apparent." See Brief for Appellants, p. 19.

It is also true that the addition of section 216(h)(3) in 1965 enlarged the group of children eligible to receive Social Security benefits to include certain illegitimate children, and that this was a liberalization of the statute. It is not true, however, that Congress, in extending benefits to an additional group, may create arbitrary patterns of discrimination not rationally related to the purpose of the Act.

father became disabled. They have been formally acknowledged by their father, they have lived with him and been cared for by him and been supported by him all their lives. He is and always has been their sole source of support and nurture. No more serious impact could be felt from a father's disability than that suffered by these children.

Indeed, all children who would qualify under section 216(h)(3) but for the birth-before-disability requirement here contested, have by definition passed the threshold consideration of receipt of support or right to support. The issue of likelihood of support, so strongly emphasized in the Secretary's brief, is therefore misplaced. All the illegitimate children discriminated against herein are *by definition* receiving support, or *by definition* have received support, or *by definition* have an enforceable right to support from their wage earner fathers.[3] These standards are established by section 216(h)(3), which makes eligible for benefits only those children who have been acknowledged in writing by their fathers, or have been decreed by a court to be the children of their fathers, or who are the beneficiaries of court support orders, or who are found by the Secretary to be living with or being at least partially supported by their fathers. Children with no experience of or right to support from their fathers would not qualify for benefits under section 216(h)(3) even if they had been born before their fathers became eligible for Social Security benefits, and would not qualify for benefits under section 216(h)(3) even if

[3] The right to support is clearly adequate to a fulfillment of dependency requirements of the Social Security Act. Legitimate children need make no showing of actual dependency or receipt of support; their right to support is enough. See sections 202(d)(1) and (3) of the Social Security Act. (42 U.S.C. §402(d)(1) and (3)).

this Court decides this case in favor of the plaintiff and invalidates the exclusion of children born after the onset of disability or old age. The issue of likelihood of support is therefore not even relevant to the discrimination complained of here.

The plaintiffs do not challenge any of the requirements of section 216(h)(3) except the requirement that the children seeking to qualify under this section must have met the qualifying tests and therefore must have been born before the onset of their fathers' entitlement to Social Security. They challenge the fact that because of their date of birth they are conclusively barred from showing that they meet the other standards of the section. The Secretary's allegations that a decision for the plaintiffs will submerge the Social Security Administration in a sea of nearly impossible questions of proof requiring the "measurement [of] affection" (Brief for Appellee, p. ), are therefore totally baseless. Only those children who can show actual support or right to support qualify now under section 216(h)(3), and only those who could make that showing would qualify after removal of the time requirement.[4]

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[4]Faced with a similar argument regarding the general likelihood of support for illegitimate children, this Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), realized that "[W]hatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery . . . ."

## II.

## THE SECRETARY IS REDUCED TO DEFENDING THE DISCRIMINATION AS A RATIONAL MEANS OF PREVENTING FRAUD, A THEORY NOT RATIONALLY RELATED TO THE FACTS OR STATUTE AND CONSISTENTLY REJECTED BY THIS COURT.

The Secretary is left with only one ground on which to rely for his argument that the exclusion of children born after the onset of their fathers' disability is constitutional: that it is a rational means of preventing fraud. The Secretary (Brief for Appellee, p. ) understandably de-emphasizes the fraud-pervention defense relied on earlier by him and by the District Court, and tries to obscure it behind a smokescreen of avoiding the encouragement of "manipulation of events" primarily for the purpose of obtaining eligibility.[5] He has a good reason to down-play this argument: it cannot stand in the face of this Court's decisions in *Stanley v. Illinois*, 405 U.S. 645 (1972); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Vlandis v. Kline*, __U.S.__ , 37 L.Ed. 2d 63 (1973); et al. (discussed in plaintiff's brief, pp. 27-36). It is, however, the Secretary's only defense.

The prevention of fraud is a valid governmental purpose, but the government's assumption here that the

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[5] If the Secretary is implying that *fraudulent* "manipulation" is involved, his argument is the same as when it was couched simply as "fraud," discussed in the text. If he is taking issue with non-fraudulent "manipulation," all he has done is pejoratively label the valid acknowledgment by fathers of their actual illegitimate children. In the last footnote of his brief, the Secretary suggests that the plaintiff children could qualify for Social Security benefits if their father adopted them. Surely the Secretary does not mean to encourage Ramon Jimenez to do exactly what he, the Secretary, has railed against throughout his brief: manipulate events in order to obtain benefits.

classification at issue serves to prevent fraud is surely as "wholly unsubstantiated" as its comparable assumption about the Food Stamp classification struck down in *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973). The Secretary has never produced the slightest evidence that the discrimination directed against illegitimate children here prevents fraudulent conduct. Even if there were such evidence, however, the blanket exclusion of an entire group of potentially eligible applicants in order to avoid the administrative effort necessary to eliminate the fraudulent claims, is an impermissible use of an irrebutable presumption in violation of the due process clause of the Fifth Amendment. *Vlandis v. Kline*, __ U.S.__, 37 L. Ed. 2d 63 (1973); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); and see *Cleveland Board of Ed. v. LaFleur*, __U.S.__, 42 U.S.L.W. 4187 (1974). The Secretary's dismissal, in a footnote (Brief for Appellee, p. ), of the now firmly established doctrine of irrebutable presumption, hardly suffices to distinguish the line of cases presented in plaintiff's opening brief.

## III.

## ILLEGITIMACY IS A SUSPECT CLASSIFICATION; THE SECRETARY HAS NEITHER REFUTED THIS PROPOSITION, NOR OFFERED A COMPELLING GOVERNMENTAL INTEREST THAT COULD JUSTIFY DISCRIMINATION AGAINST A SUSPECT CLASS.

The Secretary's contention that the invidious discrimination worked by section 216(h)(3) is constitutionally permissible because it is "rationally based" is unsupported. The exclusion of after-born illegitimate children is not rationally related to the purpose of the Social Security Act, and neither is the exclusion an acceptable

means of preventing fraud or saving administrative effort. But the Secretary's position is faulty for still another reason: he has defended the invidious discrimination on the basis of the wrong constitutional standard. The discrimination against illegitimate children effected by section 216(h)(3) can be constitutionally acceptable only if it can withstand strict judicial scrutiny because a statutory classification based on the status of illegitimacy is inherently suspect, as was argued in the Brief for Appellants at pages 38-44.[6]

The Secretary of Health, Education and Welfare's contention, in his brief (p. ), that the challenged section need only be "rationally based" because it involves benefits provided in the area of social welfare, and not "freedoms guaranteed by the Bill of Rights," misconstrues plaintiffs' argument. Plaintiffs do not argue that the classification herein must be strictly scrutinized because a fundamental right is involved. Thus the line of cases including *Dandridge v. Williams*, 397 U.S. 471 (1970), and *Jefferson v. Hackney*, 406 U.S. 535 (1972), cited by the Secretary is, irrelevant, as the nature of the benefits or interest conferred is not at issue. What is at issue is the identity of the disadvantaged group, the classification of those excluded from eligibility for the benefits. The challenged section must be subject to strict scrutiny because it excludes a group of potentially eligible applicants on the basis of their status as illegitimate children. The distinction between the two aspects of the doctrine is illustrated by *Graham v. Richardson*,

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[6]The discrimination here complained of can therefore be constitutionally permissible only if it is justified by a compelling state interest. It is not. The Secretary's rationales are inadequate under the traditional test, and clearly do not present a compelling governmental interest that can withstand heightened scrutiny. See Brief for Appellants, pp. 38-44.

403 U.S. 365 (1971). *Graham* involved the same type of social welfare benefits as had *Dandridge*. This Court applied the strict scrutiny test in *Graham* not because a fundamental interest was involved, but because benefits were denied to a group of otherwise potentially eligible applicants on the basis of their status as aliens, a "suspect" classification. Similarly, the fact that education is not a fundamental right (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)) has not prevented this Court from applying strict scrutiny to situations in which black students suffer discrimination as black students, because classification by race is constitutionally suspect. (E.g., *Brown v. Board of Ed.*, 347 U.S. 483 (1954)). If illegitimacy is properly a suspect class, discrimination against illegitimate children must be subject to strict judicial scrutiny in whatever context it appears, whether a social welfare program or a fundamental right. And indeed as plaintiffs argued in their opening brief in this case, classification on the basis of illegitimacy is "suspect": it fits within the standards articulated by this Court in its designation of other classifications as "suspect" (Brief for Appellants, pp. 29-42). Several members of this Court have recognized this fact. (Brief for Appellants, p. 42)

The Secretary's attempt to refute plaintiffs' argument is very limited. The Secretary does not dispute the appropriateness of the most crucial elements of the standard. He does not deny appellant's contention that illegitimates are a "discrete and insular minority," requiring heightened judicial solicitude. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153, n.4 (1938), *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Nor does he dispute that illegitimates have been and are "saddled with such disabilities, or subject to such a history of purposeful inequal treatment or relegated to

such a position of political powerlessness as to command extraordinary protection . . . ." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). See also *Johnson v. Robinson*, 42 U.S.L.W. 4313, 4317, footnote 14. Nor does he take issue with the fact that illegitimacy is "determined solely by the accident of birth [and therefore] the imposition of special disabilities . . . would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber v. Aetna Casualty & Surety Co.*, . . . [and] bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The Secretary makes his stand against the recognition of illegitimacy as suspect on the shaky ground of the standards of "immutability" and "visibility." (Brief for the Appellee, p. ). These may be factors to be weighed, but the relevant cases make clear that neither clear visibility nor absolute immutability is a prerequisite to a finding that a classification is suspect. The strict scrutiny test has consistently been applied to classifications on the basis of alienage and national ancestry. *Sugarman v. Dougall*, __ U.S. __, 37 L.Ed. 2d 553 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Hirabayashi v. U.S.*, 320 U.S. 81 (1942). Neither status is visible. Similarly, the application of the suspect classification test to aliens indicates that "immutability" is not a controlling factor. Indeed, from the perspective of the persons classified, alien status is much less "immutable" than illegitimacy. An alien can, under certain circumstances, choose to change his status.[7] An illegitimate child cannot. He can be legitimated only if his parents,

[7] 8 U.S.C. §1427.

who are responsible for his illegitimate status to begin with, take the necessary actions.

In sum, it is hard to imagine an instance in which heightened judicial solicitude is more appropriate than one involving discrimination against illegitimate children. This Court's past expressions on this test represent varying articulations and shadings of a common theme: the historical and ongoing imposition of political, social and legal disabilities and isolation upon a group makes appropriate a close scrutiny of a discrimination against the group. Where the legal classification in issue perpetuates or intensifies the disabilities, and/or further stigmatizes and isolates the group, then that classification must be justified by a compelling governmental interest. As this Court said in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954):

> "To separate [these children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone .... Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."

The discrimination herein against illegitimate children similarly has a detrimental effect, the impact of which is intensified because it has the sanction of this law. Furthermore, the historical discrimination[8] perpetuated

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[8] This Court has recognized that illegitimacy has been stigmatized throughout history. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1962).

by this law can only be interpreted as imputing lesser worth to the illegitimate children. And the denotation of inferiority by law and society can only create within the faultless children themselves a dimunition of feelings of self-worth. This and other discriminations against illegitimates should therefore be designated suspect.

## CONCLUSION

It is therefore respectfully submitted that the judgment of the district court should be reversed.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

## JIMENEZ ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 72-6609. Argued March 18, 1974—Decided June 19, 1974

Under the Social Security Act illegitimate children are by statute deemed entitled to disability insurance benefits without any showing that they are in fact dependent upon their disabled parent if state law permits them to inherit from the wage earner parent; or if their illegitimacy results solely from formal, nonobvious defects in their parents' ceremonial marriage; or if they are legitimated in accordance with state law. An illegitimate child unable to meet any of the foregoing conditions can qualify only if the disabled wage earner parent contributed to the child's support or lived with him or her prior to the parent's disability, 42 U. S. C. 416 (h)(3)(B), and, if the child is born after the onset of the parent's disability and is unable to qualify under any of the foregoing provisions, the statute bars the child's benefits without any opportunity to establish entitlement thereto, *ibid.* Ramon Jimenez, a resident of Illinois (which does not allow nonlegitimated illegitimate children to inherit from their father), is a wage earner covered by the Act who became entitled to disability benefits in October 1963. Thereafter, Jimenez applied for insurance benefits for appellants, two of his nonlegitimated illegitimate children who were born after the onset of disability; the claims were denied since the children did not meet the requirements of 42 U. S. C. § 416 (h)(3)(B) or the other qualifying provisions of the Act. Appellants brought this action for review of the denial of benefits. A three-judge District Court upheld the statutory classification as being rationally related to the proper governmental interest of avoiding spurious claims. *Held:* Title 42 U. S. C. § 416 (h)(3)(B), as part of the statutory scheme applicable to illegitimates, contravenes the equal protection pro-

Syllabus

visions of the Due Process Clause of the Fifth Amendment. Pp. 3–9.

(a) "[T]he Equal Protection Clause [is violated by] discriminatory laws relating to the status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175–176. *Dandridge* v. *Williams*, 397 U. S. 471, distinguished. Pp. 3–5.

(b) The primary purpose of the contested provision of the Act is to provide support for dependents of a disabled wage earner and is not, as appellee contends, to replace only that support actually enjoyed before the onset of disability. Pp. 5–6.

(c) The complete statutory bar to disability benefits imposed upon nonlegitimated after-born illegitimates in appellants' position, is not reasonably related to the valid governmental interest of preventing spurious claims. The potential for spurious claims is the same as to both. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parents, the Act's definition of two subclasses of illegitimates is "over-inclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Pp. 6–8.

(d) The judgment is vacated and the case is remanded to provide appellants an opportunity to establish their claim to eligibility as "children" of the claimant eligible for benefits under the Act. P. 8.

353 F. Supp. 1356, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 72–6609

| | |
|---|---|
| Eugenio and Alicia Jimenez, Etc., Appellants, *v.* Caspar W. Weinberger, Secretary of Health, Education and Welfare. | On Appeal from the United States District Court for the Northern District of Illinois. |

[June 19, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

A three-judge District Court in the Northern District of Illinois upheld the constitutionality of a provision of the Social Security Act which provides that certain illegitimate children, who cannot qualify for benefits under any other provision of the Act, may obtain benefits if, but only if, the disabled wage earner parent is shown to have contributed to the child's support or to have lived with him prior to the parent's disability.[1] The District Court held that the statute's classification is rationally related to the legitimate governmental interest in avoiding suprious claims. *Jimenez* v. *Richardson*, 353 F. Supp. 1356, 1361 (ND Ill. 1973). We noted probable jurisdiction. 414 U. S. 1061.

The relevant facts are not in dispute. Ramon Jimenez, a wage earner covered under the Social Security Act, became disabled in April 1963, and became entitled to disability benefits in October 1963. Some years prior to that time, the claimant separated from his wife and began living with Elizabeth Hernandez, whom he never mar-

[1] 42 U. S. C. § 416 (h)(3).

ried. Three children were born to them, Magdalena, born August 13, 1963, Eugenio, born January 18, 1965, and Alicia, born February 24, 1968. These children have lived in Illinois with claimant all their lives; he has formally acknowledged them to be his children, has supported and cared for them since their birth, and has been their sole caretaker since their mother left the household late in 1968. Since the parents never married, appellants are classified as illegitimate under Illinois law and are unable to inherit from their father because they are nonlegitimated illegitimate children. Ill. Ann. Stat., c. 4, § 12.

On August 21, 1968, Ramon Jimenez, as the father, filed an application for child's insurance benefits on behalf of these three children. Magdalena was found to be entitled to child's insurance benefits under the statute because she had been conceived before Jimenez became disabled and no issue is presented with respect to her entitlement to benefits. The claims of Eugenio and Alicia were denied, however, on the grounds that they did not meet the requirements of 42 U. S. C. § 416 (h) (3), since neither child's paternity had been acknowledged or affirmed through evidence of domicile and support before the onset of their father's disability.[2] In all other re-

[2] The contested Social Security scheme provides, in essence, that legitimate or legitimated children (42 U. S. C. § 402 (d) (3)), illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile (42 U. S. C. § 416 (h) (2) (A)), and those children who cannot inherit only because their parents' ceremonial marriage was invalid for nonobvious defects (42 U. S. C. § 416 (h) (B)), are entitled to receive benefits without any further showing of parental support. However, illegitimate children such as Eugenio and Alicia who were born after their father became entitled to disability or death insurance benefits, and who do not fall into one of the foregoing categories, are not entitled to receive any benfits. 42 U. S. C. § 416 (h) (3).

spects Eugenio and Alicia are eligible to receive child's insurance benefits and their applications were denied solely because they are proscribed illegitimate children born after the onset of the father's disability.

Appellants urge that the contested Social Security provision is based upon the so-called "suspect classification" of illegitimacy. Like race and national origin, they argue, illegitimacy is a characteristic determined solely by the accident of birth, it is a condition beyond the control of the children, and it is a status that subjects the children to a stigma of inferiority and a badge or opprobrium. We need not reach appellants' argument, however, because in the context of this case it is enough that we note, as we did in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, that:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." 406 U. S., at 175–176.

Conversely, the Secretary urges us to uphold this statutory scheme on the ground that the case is controlled by

the Court's recent ruling *Dandridge* v. *Williams*, 397 U. S. 471, where we noted that:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69–70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426." 397 U. S., at 485.

However, *Dandridge* involved an equal protection attack upon Maryland's Aid to Families with Dependent Children program which provided aid in accordance with the family's standard of need, but limited the maximum grant to $250 per family, regardless of size, thereby reducing the per capita allowance for children of large families. We noted that the AFDC welfare program is a "scheme of cooperative federalism" and that the "starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." 397 U. S., at 478. This special deference to Maryland's statutory approach was necessary because, "[g]iven Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family." 397 U. S., at 479. Here, by contrast, there is no

evidence supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefited by the Act. On the contrary, the Secretary has persistently maintained that the purpose of the contested statutory scheme is to provide support for dependents of a wage earner who has lost his earning power, and that the provisions excluding some after-born illegitimates from recovery are designed only to prevent spurious claims and ensure that only those actually entitled to benefit receive payments. Accepting this view of the relevant provisions of the Act, we cannot conclude that the purpose of the statutory exclusion of some after-born illegitimates is to achieve a necessary allocation of finite resources and, to that extent, *Dandridge* is distinguishable and not controlling.

As we have noted, the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner.[3] The Secretary maintains that the Act denies benefits to after-born illegitimates who cannot inherit or whose illegitimacy is not solely because of a formal, nonobvious defect in their parents' wedding ceremony, or who are not legitimated, because it is "likely" that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner which would entitle them to recovery under the Act and because eligibility for such benefits to those illegitimates would open the door to spurious claims. Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset

[3] See House-Senate Conference Comm. Rep. on 1965 Amendments to Social Security Act, 111 Cong. Record 18387 (July 27, 1965); Report on the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement, 67 (Washington, D. C. 1965).

of disability; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner's disability would be allowed to recover. We do not read the statute as supporting that view of its purpose. Under the statute it is clear that illegitimate children born after the wage earner becomes disabled qualify for benefits if state law permits them to inherit from the wage earner, § 416 (h) (2) (A); or if their illegitimacy results solely from formal, nonobvious defects in their parents' ceremonial marriage, § 416 (h) (2) (B); or if the child is legitimated in accordance with state law, § 402 (d)(3)(A). Similarly, legitimate children born after their wage-earning parent has become disabled and legitimate children born before the onset of disability are entitled to benefits regardless of whether they were living with or being supported by the disabled parent at the onset of the disability, §§ 402 (d) (1) and (3).

In each of the examples just mentioned, the child is by statute "deemed dependent" upon the parent by virtue of his or her status and no dependency or paternity need be shown for the child to qualify for benefits. However, nonlegitimated illegitimates in appellants' position, who cannot inherit under state law and whose illegitimacy does not derive solely from a defect in their parents' wedding ceremony, are denied a parallel right to the dependency presumption under the Act. Their dilemma is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their 'claim' to support and, hence, their right to eligibility. § 416 (h) (3) (B). The Secretary maintains that this absolute bar to disability benefits is necessary to prevent spurious claims because "To the unscrupulous person, all that prevents him from realizing . . . gain is the mere formality of a spurious acknowl-

edgment of paternity or a collusive paternity suit with the mother of an illegitimate child who is herself desirous or in need of the additional cash." *Jimenez* v. *Richardson*, 353 F. Supp. 1356, 1361 (ND Ill. 1973).

From what has been outlined it emerges that after-born illegitimate children are diveded into two sub-classifications under this statute. One sub-class is made up of those (a) who can inherit under state intestacy laws, or (b) who are legitimated under state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage. These children are deemed entitled to receive benefits under the Act without any showing that they are in fact dependent upon their disabled parent. The second subclassification of after-born illegitimate children includes those who are conclusively denied benefits because they do not fall within one of the foregoing categories and are not entitled to receive insurance benefits under any other provision of the Act.

We recognize that the prevention of spurious claims is a legitimate governmental interest and that, dependency of illegitimates in appellants' subclass as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of after-born illegit-

imate without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.

The Secretary does not contend that it is necessarily or universally true that all illegitimates in appellants' subclass would be unable to establish their dependency and eligibility under the Act if the statute gave them an opportunity to do so. Nor does he suggest a basis for the assumption that all illegitimates who are statutorily deemed entitled to benefits under the Act are in fact dependent upon their disabled parent. Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is "over-inclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provisions of the Fifth Amendment. *Schneider* v. *Rusk*, 377 U. S. 163, 168; *Bolling* v. *Sharpe*, 347 U. S. 497, 499.

In the District Court the Secretary, relying on the valadity of the statutory exclusion, did not undertake to

challenge the assertion that appellants are the children of the claimant, that they lived with the claimant all their lives, that he has formally acknowledged them to be his children, and that he has supported and cared for them since their birth. Accordingly the judgment is vacated and the case is remanded to provide appellants an opportunity, consistent with this opinion, to establish their claim to eligibility as "children" of the claimant under the Social Security Act.

*Vacated and remanded.*

# SUPREME COURT OF THE UNITED STATES

No. 72–6609

| | |
|---|---|
| Eugenio and Alicia Jimenez, Etc., Appellants, *v.* Caspar W. Weinberger, Secretary of Health, Education and Welfare. | On Appeal from the United States District Court for the Northern District of Illinois. |

[June 19, 1974]

MR. JUSTICE REHNQUIST, dissenting.

I frankly find the Court's opinion in this case a perplexing three-legged stool. The holding is clearly founded in notions of equal protection, see p. 8, *ante*, and the Court speaks specifically of improper "discrimination." Yet the opinion has strong due process overtones as well, at times appearing to pay homage to the still novel, and I think unsupportable, theory that "irrebutable presumptions" violate due process. At other times the opinion seems to suggest that the real problem in this case is the Government's failure to build an adequate evidentiary record in support of the challenged legislation. The result is a rather impressionistic determination that Congress' efforts to cope with spurious claims of entitlement, while preserving maximum benefits for those persons most likely to be deserving, are simply not satisfactory to the members of this Court. I agree with neither the Court's approach nor its decision.

The Court's equal protection analysis is perhaps most difficult to understand. The Court apparently finds no need to resolve the question of whether illegitimacy constitutes a "suspect classification," noting instead that "'the Equal Protection Clause does enable us to strike

down discriminatory laws *relating to the status of birth* where . . . the classification is justified by no legitimate state interest, compelling or otherwise.' [*Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164], at 175–176." (Emphasis added.) This statement might be thought to set the stage for a decision striking down the legislation on the basis of discrimination between legitimates and illegitimates. But the Court then leaves that issue, finding instead that the statute is unconstitutional because it "discriminate[s] between the two subclasses of afterborn *illegitimates* without any basis for the distinction . . . ." *Ante*, p. 7–8. (Emphasis added.) Whatever may be the rationale for giving some form of stricter scrutiny to classifications between legitimates and illegitimates, that rationale simply vanishes when the alleged discrimination is between classes of illegitimates. Such classifications should instead be evaluated according to the traditional principle set forth in *Dandridge* v. *Williams*, 397 U. S. 471 (1970): "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " 397 U. S., at 485. (Citations omitted.)

The Court's rejection of this principle strongly smacks of due process rather than equal protection concepts. The Court states that "[a]ssuming . . . appellants are in fact dependent on the claimant, it would not serve the purpose of the Act to *conclusively* deny them an opportunity to establish their dependency and their right to insurance benefits," *ante*, p. 7 (emphasis added), and indicates that the real problem with the legislation is that it is both "over-inclusive" and "under-inclusive." According to the Court, the legislation cannot stand because "some children" entitled to benefits "are not dependent upon their disabled parent" and because "some illegitimates" who do not get

benefits "are, in fact, dependent upon their disabled parent." *Ante*, p. 8. In my view this is simply an attack on "irrebutable presumptions" in another guise. See *Cleveland Board of Education* v. *LaFleur*, — U. S. — (1973). The very process of making legislative decisions to govern society as a whole means that some individuals will be treated less favorably than other individuals who fall within a different legislative classification. As THE CHIEF JUSTICE stated only last Term in *Vlandis* v. *Kline*, 412 U. S. 441: "[L]iterally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determination. . . ." This Court should not invalidate such classifications simply out of a preference for different classifications or because an unworkable system of individualized consideration would theoretically be more perfect.

There are also hints in the opinion that the Government failed to build an adequate evidentiary record in support of the challenged classifications. Thus the Court distinguishes *Dandridge* v. *Williams*, *supra*, a case in which the Court respected the State's allocation of limited resources, by saying: "Here, by contrast, *there is no evidence* supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefited by the Act." *Ante*, p. 5. (Emphasis added.) I should think it obvious that any increase in the number of eligible recipients would serve to additionally deplete a fixed fund, but I find even stranger the notion that the Government must present evidence to justify each and every classification that a legislature chooses to make. If I read the Court's opinion correctly, it would seem to require, for example, that the

Government compile evidence to support Congress' determination that Social Security benefits begin at a specified age, perhaps even requiring statistics to show that need is greater (in all cases?) at that age than at lesser ages. This proposition is certainly far removed from traditional principles of deference to legislative judgment. As we stated in *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961): "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." There is nothing in that language that suggests to me that courtrooms should become forums for a second round of legislative hearings whenever a legislative determination is later challenged.

Since I believe that the District Court correctly concluded that the classifications at issue rest upon a rational basis, I dissent.